No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHRISTOPHER W. GRENIER,
PAUL C. BOCK and TODD M. SHEA,

Petitioners,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for certiorari presents three questions:

First, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the final decision-maker had imputed knowledge of the target employees' protected disclosures and acted as a conduit for management officials with retaliatory animus.

Second, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the agency's stated reason for punishing the whistleblower employees is retaliatory on its face and the agency's proffered legitimate reasons are inextricably intertwined with that facially retaliatory rationale.

Third, whether under the Whistleblower Protection Act a federal agency can overcome its proven retaliation with a clear and convincing affirmative defense where the agency puts into the record no evidence of similar treatment of similarly-situated non-whistleblowers.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

i.

The names of all parties appear in the caption of the case.

ii.

Counsel for Petitioners, Christopher Grenier, Todd Shea, and Paul Bock, certifies the following:

1. The full name of every party or amicus represented by me is:

Christopher Grenier, Todd Shea, and Paul Bock.

2. The name of the real party in interest represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Peter H. Noone, Esq., AVERY DOOLEY POST & AVERY, LLP, 90 Concord Avenue, Belmont, MA 02478.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit is unreported and reproduced in the appendix hereto ("App.") at A1. The petitioner has not filed a petition for rehearing.

The April 19, 2005 Final Order of the Merit System Protection Board denying petitioners petition for review and reconsideration is unreported and is reproduced at App. A3.

The September 19, 2003 Initial Decision issued by Administrative Judge William Carroll of the Merit Systems Protection Board, Boston Field Office, is not reported and is reproduced at App. A8.

The April 14, 2003 Order issued by Administrative Judge William Carroll of the Merit System Protection Board, Boston Field Office, is not reported and is reproduced at App. A71.

The December 31, 2002 Order Granting Stay Request issued by Administrative Judge William Carroll of the Merit System Protection Board, Boston Field Office is not reported and is reproduced at A78.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

Petitioners timely filed their Petition for Certiori within ninety (90) days of the entry of judgment by the United States Court of Appeals for

the Federal Circuit, issued July 14, 2006, thereby initiating the instant appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 2302

5 U.S.C. § 1221

STATEMENT OF THE CASE

This case arises out of the Drug Enforcement Administration's treatment of four special agents assigned to the New Bedford, Massachusetts Resident Office ("NBRO"): Todd Shea, Paul Bock, Christopher Grenier, and Daniel Forde, all of whom worked as part of the New Bedford Task Force ("NBTF"), a law enforcement partnership between the DEA, the Massachusetts State Police, and local police departments. During the course of their employment, Petitioners Shea, Bock, and Grenier made protected disclosures concerning office supervisor Resident Agent in Charge ("RAC") John Schaefer's abuse of authority, mismanagement of the office, and ongoing threatening and retaliatory behavior toward individual officers within the task force. Coinciding with Petitioners' own disclosures, three members from the Massachusetts State Police ("MSP") also lodged complaints regarding Schaefer.

The fourth DEA Agent, Forde, made no such protected disclosures.

Petitioners' third level supervisor was SAC Mark Trouville ("Trouville"), who began his tenure with the New England Field Division ("NEFD") in March 2002. Almost immediately, Trouville ordered A/SAC Rodney Benson ("Benson") to conduct a management review of the NBRO, during which Petitioners made protected disclosures regarding Schaefer that detailed the same concerns they had disclosed more than a year earlier. Benson's Management Review Report memorialized Appellant's disclosures and concluded that "[s]ystematic, across the board transfers/removals of all assigned personnel (NBRO) appears to be the only viable solution to what appears to be a long term, ongoing, institutionalized issue fueled by preconceived notions and prejudices toward the RAC." App. at 123.

In August 2002, Trouville forwarded Benson's Management Review Report to HQ Inspectors and included his own cover letter characterizing Petitioners' criticisms of Schaefer as "rebellion" within the office.[1] App. at 129. Aware of Trouville's intent to move agents, and pre-armed with evidence exclusively targeting Petitioners, the Office of the Chief Inspector conducted its inspection of the NEFD and the NBRO on August 19, 2002, led by Senior Inspector Dearing ("Dearing"). After the inspection, Cazenavette, the official who signed the recommendation for reassignments to Chief of Operations Rogelio Guevara ("Guevara"), told

---

[1] Chief of Operations Rogelio Guevara, the ultimate deciding official for geographical reassignments, was copied on this cover letter, which indicated that Petitioners and MSP officers reacted to RAC Schaefer with "rebellion."

Trouville that Petitioners had "sided with the MSP" in the "beef" with Schaefer. App. at 131-34.

Prior to making his decision, Guevara received a draft recommendation for reassigning Petitioners, prepared by several Agency officials. Dearing, whom the AJ found to have actual knowledge of Petitioners' whistleblowing activities, helped draft the recommendation. The recommendation for reassignments stated that "SAs Grenier, Shea and Bock failed to support DEA and its mission, and in fact actively supported the position of the Massachusetts State Police against DEA's interest." App. at 126-27. The recommendation, therefore, merely repeated Trouville's, Benson's, and Dearing's insistence that Petitioners had "sided with the MSP."

By signing off on the reassignments, Guevara simply carried out the retaliation recommended by Agency officials with actual knowledge of Petitioners' whistleblowing activities.

On September 26, 2002, Shea was reassigned to El Paso, Texas; Grenier was reassigned to Calexico, California; and Bock was reassigned to Eagle Pass, Texas. The Agency's stated reasoning for reassigning Petitioners was their "siding with MSP" in making protected criticisms of Schaefer and various performance failures. This reasoning is contained in both the September 26, 2002 recommendation and the October 29, 2002 summary to the Agency Administrator. See App. at 126-27 and 93.

Agent Forde, who made no protected disclosures, was not reassigned.

After Petitioners vetted their complaints through the Office of Special Counsel, they presented whistleblower retaliation appeals to the MSPB and requested stays of their reassignments. The AJ granted the stays, commenting in part, "The agency has to realize how bad the appearance is of reassigning only the three whistleblowers [Petitioners] while leaving the non-whistleblower [Agent Forde] in place." App. at 85.

The AJ bifurcated the case into two hearings.

At the first hearing, the AJ concluded Petitioners were whistleblowers and that their whistleblowing was a contributing factor in their reassignments. Making this determination, the AJ specifically found that the Agency officials involved in the decision possessed actual and constructive knowledge of Petitioners' protected disclosures and that the temporal connection between the disclosures and the reassignments demonstrated a retaliatory intent. App. at 72-3. The Agency never challenged these findings.

After the second hearing, however, the AJ found that the Agency would have taken the action absent Petitioners' whistleblowing. App. at 24-64. In deciding that the Agency met its burden of

showing clear and convincing evidence, however, the AJ[2] made at least three material errors of law.

First, the AJ failed to consider that the retaliatory motives of Agency officials with actual knowledge of Petitioners' whistleblowing could, and did, prejudice the deciding official who signed off on the reassignment recommendation. The AJ erroneously determined that, regardless of the tainted influence of management officials with proven retaliatory animus, the Agency must prevail unless the deciding official himself had actual knowledge of Petitioners' whistleblowing. App. at 29-32.

Second, the Agency's stated reason for reassigning Petitioners was retaliatory on its face and inextricably intertwined with the other, post hoc justifications the Agency proffered. The AJ allowed the Agency to prove its affirmative defense without producing any reason for the reassignments not linked to Petitioners' protected disclosures. App. at 34-35.

Third, the AJ allowed the Agency to prove its affirmative defense despite the Agency's failure to put on any evidence that it reassigned the fourth agent in the office, the non-whistleblower, or any other similarly situated employee who was not a whistleblower. App. at 61-64.

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[2] This petition will refer to the AJ's decision because, although the U.S. Court of Appeals for the Federal Circuit affirmed that decision, it did so without issuing an opinion of its own.

The full Merit Systems Protection Board denied a petition for review of the AJ's decision on April 19, 2005. App. at 3.

The United States Court of Appeals for the Federal Circuit affirmed the Board's decision, without opinion, on July 14, 2006. App. at 1.

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States should grant this petition for a writ of certiori in order to rectify a conflict in federal anti-retaliation case law that endangers federal employee whistleblowers. The conflict concerns the role of imputed knowledge in proving retaliation based on protected activity. Where the protected activity is filing a complaint of discrimination under Title VII, a retaliation claim may succeed despite the decision-maker's lack of actual knowledge. See Shager v. Upjohn Co., 913 F.2d 398 (1990) (imputing improper motives to an impartial decision-making committee that was "just a liability shield invented by lawyers" whose members "acted as the conduit" for a management official's prejudice); see also Echard v. Attorney General, E.E.O.C. 07A20137 (2003) (finding that a "SAC did not need to have actual knowledge of complainant's prior EEO activity when he was acting as a conduit of ASAC's prejudice"). But based on the reasoning in the instant case, a retaliation claim cannot succeed under the WPA unless the decision-maker had actual knowledge.

In the U.S. Court of Appeals decision presently under appeal, a federal agency escapes liability for its proven retaliation simply because the deciding official had no actual knowledge of Petitioners' whistleblowing activity. If a federal agency can produce a clear and convincing affirmative defense by doing nothing more than pointing to the deciding official's lack of actual knowledge, then no federal whistleblower will ever prove retaliation. The rationale in this decision eviscerates the protections afforded under 5 U.S.C. § 2302 for any case based on imputed knowledge. Henceforth, federal agencies will always be able to insulate acts of retaliation by carrying them out through deciding officials with no actual knowledge of the victim's whistleblowing.

ARGUMENT

For the following three reasons, the decision from which Petitioners appeal is erroneous and endangers federal whistleblowers everywhere.

I. Petitioners proved retaliation and the Agency cannot produce a clear and convincing affirmative defense where the deciding official had imputed knowledge of Petitioners' protected disclosures and acted as a conduit for management officials with actual retaliatory animus.

In affirming the final decision of the Administrative Judge ("AJ"), the U.S. Court of Appeals erred because that decision allowed the Agency to prove its affirmative defense simply by

pointing to the deciding official's lack of actual knowledge of Petitioners' whistleblowing. The AJ rendered meaningless the fact that deciding official, who signed off on the recommended reassignments, acted as a conduit for management officials with actual retaliatory animus. The AJ determined that the individuals who recommended Petitioners' reassignments had actual knowledge of Petitioners' whistleblowing. App. at 72-3. Indeed, the recommendation explicitly cited Petitioners' whistleblowing as the reason for the reassignments. App. at 30-1. Petitioners had made protected disclosures substantially similar to protected disclosures made by members of the Massachusetts State Police ("MSP), and the recommendation stated that Petitioners should be reassigned for "siding with the MSP."

Although the AJ found that the deciding official did not know the meaning of "siding with MSP," the AJ failed properly to consider whether the deciding official was unduly influenced by those who did. Instead, the AJ found that the Agency's post hoc reasons for reassigning Petitioners were strong because nothing in the document recommending Petitioners' reassignments would give the deciding official actual knowledge that Petitioners were whistleblowers. App. at 31-2. This decision to focus on the deciding official's actual knowledge is wrong for several reasons.

First, the deciding official's level of knowledge regarding Petitioners' whistleblowing activities is not relevant, much less conclusive, when analyzing the strength of the Agency's reasons for reassigning

Petitioners. The AJ was required to carry out an analysis of the strength of the Agency's reasons independent of any inquiry into what the deciding official actually knew.

Second, the AJ ignored the undue influence of management officials with actual knowledge of Petitioners' whistleblowing. The Initial Decision makes it clear that the deciding official would not have approved the reassignments without the recommendation of the recommending official. Further, the AJ found that the recommending official relied completely on Senior Inspector Dearing, who had actual knowledge of Petitioners' whistleblowing when he drafted the recommendation for Petitioners' reassignments. App. at 36-38 and 40. Despite recognizing that the decision to reassign Petitioners would not have been made without the influence of officials with retaliatory animus, the AJ failed to impute their unlawful motives to the deciding official. Instead, he allowed the Agency to escape liability by choosing a pawn who fulfilled other officials' retaliatory goals.

The AJ's exclusive focus on the deciding official's actual knowledge of Petitioners' whistleblowing activities erroneously resurrected an issue that the first hearing resolved and improperly placed the burden of proof upon Petitioners. The law does not require Petitioners to prove that the Agency knew that their disclosures were legally protected during a consideration of the Agency's affirmative defense. By its plain language, 5 U.S.C. § 2302(b)(8) shows that the proper object of inquiry is whether the employee, and not the agency, had a reasonable

basis to believe that the information he or she disclosed falls within the types of wrongdoing listed in the statute.

Third, it is an error of law to require Petitioners to show that each official involved in the reassignment decision had actual knowledge of their protected disclosures. Under the theory of imputed knowledge, Petitioners can satisfy their burden by showing that some Agency official(s) with actual knowledge unduly influenced the decision-making process. As stated above, Petitioners proved during the first hearing that they would not have been reassigned but for the recommendation of Agency officials with actual knowledge of their whistleblowing. App. at 34-35 and 50.

Consideration of the Agency's affirmative defense cannot erase the AJ's finding that Petitioners made protected disclosures that were a contributing factor in their reassignments. Petitioners satisfied their burden of proof by demonstrating that those with actual knowledge of their whistleblowing influenced the deciding official.

The AJ erased this finding, however, and improperly shifted the burden of proof away from the Agency by holding that the only avenue for contesting the strength of the Agency's reasons was to demonstrate that the deciding official's evaluation of Petitioners was unduly influenced by reprisal for whistleblowing. App. at 35. Under the AJ's analysis, merely insulating the deciding official from any information surrounding Petitioners' protected disclosures would guarantee the Agency's success.

The AJ's approach would enable the Agency to avoid liability for retaliation, no matter how blatant, simply by blindfolding the ultimate decision maker.

II. The Agency cannot produce a clear and convincing affirmative defense where its stated reason for punishing Petitioners is retaliatory on its face and the Agency's proffered legitimate reasons are inextricably intertwined with that facially retaliatory rationale.

The Agency's repeated admission that it reassigned Petitioners because they "sided with the MSP" in making protected disclosures about RAC Schaefer is a patently retaliatory rationale that is inextricably intertwined in the ultimate decision. Management officials with actual knowledge of Petitioners' whistleblowing asserted that Petitioners "sided with the MSP," thereby expressing a retaliatory animus for which the deciding official acted as a conduit.

The accusation that Petitioners "sided with the MSP" originated in Benson's Management Review Report, which memorialized Petitioners' protected disclosures about RAC Schaefer's mismanagement, abuse of authority, and threatening and retaliatory behavior. App. at 107-117. The Management Review Report also memorialized similar disclosures from the MSP. The following passage from the Management Review Report leaves no doubt that Petitioners "sided with the MSP" through their whistleblowing activity.

"At the epicenter of each and every negative issue, according to these interviews, is the RAC. All of the related problems seem to radiate from a sense of division within the office. The underlying reason for this division is clearly two schools of thought separating the offices into two camps: those who have taken the side of the RAC and those who continue to disagree with him. Those who oppose the RAC may have taken these disagreements to extreme, even hurtful measures. Most troubling of all is that this camp is made up of a representative sampling of both offices, to include DEA employees. These DEA employees include CCTF Office Assistant Diane Thompson **and NBRO Special Agents Shea and Bock** [emphasis added]. Based on the removal of the CCTF Officers and Lts., it appeared to ASAC Benson and GS Ducey that these employees developed a "personal" hatred toward RAC Schaefer and made efforts to try to remove RAC Schaefer from his position." App. at 122.

The Management Review Report, which specifically included Shea and Bock among "those who oppose the RAC," contained no evidence that Petitioners "sided with the MSP" in any way other than by echoing MSP whistleblowers concerned about Schaefer's mismanagement and abuse of authority. Without exception, the references to "siding with the MSP" appear in the context of Petitioners' protected disclosures.

The HQ Inspection, which the Agency later cited in an effort to retroactively legitimize the retaliatory reassignments, only confirmed Petitioners' whistleblowing activity. Dearing, who

was the lead inspector for the HQ Inspection, exactly echoed the Management Review Report by accusing Petitioners of having "sided with the Massachusetts State Police[,] much to the chagrin...of RAC Schaefer, so much to the point that RAC Schaefer, in fact, submitted his papers and retired." Only Petitioners' protected disclosures and efforts to remove Schaefer could cause him such chagrin. Dearing received notice that Petitioners "sided with the MSP" from the Management Review Report.

SAC Trouville, who was Petitioners' third-level supervisor, revealed that "siding the MSP" was simply the Agency's euphemism for Petitioners' protected disclosures when he forwarded to the HQ Inspectors a copy of the Management Review Report (App. at 128), from which they learned that Petitioners' "preconceived notions and prejudices towards the RAC" justified "systematic, across the board transfers." App. at 123. Trouville's cover letter to the Management Review Report candidly acknowledges that Schaefer's "heavy handed attempts appear to have been met with rebellion not only from the MSP officers, but also from several of our Special Agents." App. at 139 (emphasis added). The only "rebellion" that Schaefer's heavy-handedness inspired in both Petitioners and MSP officers was their mutual whistleblowing activity.

Similarly, Cazenavette's recommendation for reassignments, which stated that Petitioners "actively supported the position of the Massachusetts State Police," was prepared by three Agency officials with actual knowledge of Petitioners' whistleblowing. App. at 93. Cazenavette

demonstrated his knowledge of Petitioners' protected disclosures, and his retaliatory mindset, when he told Trouville in person that Petitioners had sided with the MSP in the "beef" with the RAC. Trouville, the recommending official, acknowledged that "siding with the MSP" was "precisely" what the Management Review Report indicated. App. at 131.

By declaring, in person and in writing, that Petitioners actively supported the position of the MSP, therefore, Cazenavette could only mean that, like the MSP Lieutenants, Petitioners blew the whistle on Schaefer's mismanagement and abuse of authority. Despite its post hoc efforts to justify the reassignments, the Agency has never backed off from its original, retaliatory rationale. Indeed, the Agency has repeatedly stated that the reassignments were made in "concurrence" with the Management Review Report that documented Petitioners' (and the MSP's) protected disclosures about Schaefer.

The plain meaning of the Agency's chosen language demonstrates that it retaliated against Petitioners for making legally-protected disclosures about RAC Schaefer. The sole issue upon which Petitioners and MSP agreed was that Schaefer mismanaged, abused his authority, and endangered lives. By justifying Petitioners' reassignments with a reason that is retaliatory on its face, the Agency could not possibly prove its affirmative defense by clear and convincing evidence because the retaliatory rationale is inextricably intertwined with all of the Agency's post hoc explanations for the reassignments.

III. The Agency cannot produce a clear and convincing affirmative defense where it puts into the record no evidence of similar treatment of similarly situated non-whistleblowers.

A federal agency cannot meet its clear and convincing burden where it fails to produce any evidence that it treated similarly situated non-whistleblowers in the same manner it treated Petitioners. Similarly situated employees must perform the same job duties and report to the same supervisor. The Agency produced no evidence of similar treatment to non-whistleblowers who perform the same job duties and report to the same supervisor as Petitioners.

In a clearly erroneous exercise, the AJ compared Petitioners, who held non-supervisory positions in New Bedford, Massachusetts, to "a RAC and three assistant special agents in charge from the Detroit field office." App. at 63.

As a matter of law, the Agency could not possibly have proven its affirmative defense by comparing its treatment of the management officials from far-away offices. Moreover, the Agency put on no evidence that these management officials were not whistleblowers themselves. See App. at 63.

Ironically, Agent Forde, a fellow Special Agent who worked in the same office as Petitioners and also reported to RAC Schaefer, is the only employee whom the AJ insists was not similarly situated to Petitioners. App. at 61-2. By contrast, in the early stages of litigation, the AJ recognized that

Petitioners differed from Forde only by virtue of their whistleblowing. At that time, the AJ warned that the Agency "has to realize how bad the appearance is of reassigning only the three whistleblowers while leaving the non-whistleblower [Mr. Forde] in place." App. at 85. The point remains, however, that the Agency and the AJ did not cite to one instance when the Agency reassigned a similarly situated non-whistleblower.

Faced with uncontradicted evidence that Petitioners' reassignments were without precedent, no reasonable trier of fact could have found that the Agency proved its affirmative defense by clear and convincing evidence. Far from offering clear and convincing proof, the Agency put on no evidence that could explain away the "bad...appearance...of reassigning only the three whistleblowers while leaving the non-whistleblower [Mr. Forde] in place." An agency cannot prevail when it defaults on one of the required factors of its affirmative defense.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

/s/

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No. (2)

Supreme Court, U.S.
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CHRISTOPHER W. GRENIER,
PAUL C. BOCK and TODD M. SHEA,

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v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

APPENDIX

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NOTE: Pursuant to Fed. Cir. R. 47.5, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

[ENTERED JULY 14, 2006]

05-3213

CHRISTOPHER W. GRENIER, PAUL C. BOCK, and TODD M. SHEA,
Petitioners,

v.

DEPARTMENT OF JUSTICE,
Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

In CASE NO(S).
BN1221030033-W-1,
BN1221030034-W-1, and
BN1221030035-W-1.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MICHEL, Chief Judge RADER and SCHALL, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36
ENTERED BY ORDER OF THE COURT

Dated: JUL 14 2006

/s/
Jan Horbaly, Clerk

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD BOSTON FIELD OFFICE

CHRISTOPHER W. GRENIER, PAUL C. BOCK, TODD M. SHEA,
Appellants,

v.

DEPARTMENT OF JUSTICE,
Agency.

[ENTERED April 19, 2005]

DOCKET NUMBERS
BN-1221-03-0033-W-1
BN-1221-03-0034-W-1
BN-1221-03-0035-W-1

DATE: April 19,2005

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellants.

Imelda L. Paredes, Esquire, Alexandria, Virginia, for the agency.

BEFORE
Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellants have filed a petition for review in this case asking us to reconsider the initial

decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R § 1201.115(d)

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANTS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after-receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed; *See Pinat* v. *Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: /s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

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April 19, 2005 /s/
(Date) Dinh-Chung
Case Management Specialist

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD BOSTON FIELD OFFICE

CHRISTOPHER W. GRENIER, PAUL C. BOCK, TODD M. SHEA,
Appellants,

v.

DEPARTMENT OF JUSTICE,
Agency.

[ENTERED Sept. 19, 2003]

DOCKET NUMBERS
BN-1221-03-0033-W-1
BN-1221-03-0034-W-1
BN-1221-03-0035-W-1

DATE: September 19,2003

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellants.

Imelda L. Paredes, Esquire, Alexandria, Virginia, for the agency.

BEFORE
William Carroll
Chief Administrative Judge

INITIAL DECISION

On November 8, 2002, each of the appellants, Special Agents with the Drug Enforcement Administration

(DEA), timely submitted individual-right-of-action (IRA) appeals[1] from the Office of. Special Counsel's (OSC's) November 5, 2002 closeout letter stating it was terminating its investigation of each appellant's allegation that he was retaliated against for his whistleblowing activity when he was reassigned[2] from New Bedford, Massachusetts to a location on the southwest border of the United States.[3] Per 5 C.F.R. § 1201.36(a), the three appeals were consolidated for processing on December 16, 2002. *Grenier* v. *Department of Justice,* MSPB Dkt. No. BN-1221-03-0033-W-1 (*Grenier* W-1 or *Grenier et* al.),[4] Tab 11; 5 C.F.R. § 1201.36(a)(1). The Board has jurisdiction over the appeals as noted below. A

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[1] *See generally* 5 C.F.R. Part 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing) and, in particular, 5 C.F.R. § 1209.2(b)(1) (Board jurisdiction over IRA appeals).

[2] The parties frequently referred to the actions as transfers. According to the Office of Personnel Management's regulations at 5 C.F.R. § 210.102(b)(18), a transfer "means a change of an employee ... from a position in one agency to a position in another agency." The appellants, however, never were slated to leave DEA's employ. More precisely, the appellants: were subject to reassignment actions. According to 5 C.F.R. § 210.102(b)(12), a reassignment "means a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion." Also, I note that although the agency made a decision to take the reassignment actions, to date the actions have not been effected.

[3] Grenier was reassigned to Imperial County, California; Bock to Eagle Pass, Texas; and Shea to El Paso, Texas.

[4] This case was adopted ay the lead case.

hearing in the consolidated appeal was held in two parts: on February 24-25, 2003,and on June 16-18, 2003. For the reasons set forth below, the appellants' request for corrective action is DENIED.

BACKGROUND

Following an agency decision on September 26, 2002 to reassign them, the appellants each filed a "Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity" with OSC on October 8, 2002.[5] They also requested OSC to request a stay from the Merit Systems Protection Board.[6] *Grenier v. Department of Justice,* MSPB Dkt. No. BN-1221-03-0033-S-1 *Grenier* S-l), Tab 1, Exh. A, *Bockv. Department of Justice,* MSPB Dkt. No. BN-1221-03-0034-S-1 *(Bock* S-l), Tab 1, Exh. A, and *Shea v. Department of Justice,* MSPB Dkt. No.BN-1121-03-0035-S-1 (*Shea* S-l), Tab 1, Exh. A. A review of each appellant's complaint reveals that he cited various actions that he was reporting to OSC, only one of which was the proposed reassignment. *Id.* OSC refused to ask the Board for a stay and otherwise on October 31, 2002, made a preliminary determination to close its inquiry on each appellant's complaint *relative to the reassignment action only. Grenier S-*1, Tab 1, Exh. E; *Bock* S-l, Tab 1, Exh. F; and *Shea* S-l, Tab 1, Exh. F. The appellants did not choose to respond with any new information to this

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[5] The appellants have been represented throughout by Attorney Noone who has for the most part submitted joint documentation to OSC and to the Board.

[6] This stay request would have been to a member of the Board in Washington, D.C., pursuant to 5 U.S.C. § 1214(b)(l)(A).

preliminary determination so, on November 5, 2002, OSC notified each appellant that it was closing its file on the matter of his reprisal charge for the reasons stated in its October 31, 2002 determination. *Grenter* S-l, Tab 1, Exh. F; *Bock* S-l, Tab 1, Exh. G; and *Shea* S-l, Tab 1, Exh. G.

The appellants next, as mentioned above, filed their appeals with this office on November 8, 2002 and simultaneously requested stays of their reassignments, scheduled for various dates in January 2003. On November 25, 2002, I denied each appellant's request for a stay *based on the evidence in the record at that time.* I found, in short, that the strength of the agency's motive to retaliate was weak and that otherwise there existed evidence to support the agency's reassignment of each-'appellant; thus, there was not a substantial likelihood that any of the appellants would prevail on the merits of his appeal. 5 C.F.R. § 1209.10(b)(2); *Grenier* S-l, Tab 2; *Bock* S-l, Tab 2; and *Shea* S-l, Tab 2.

The appellants each filed a second request for a stay on December 17, 2002 based on newly discovered evidence. *Grenier* S-2, Tab 1; *Bock* S-2, Tab 1; and *Shea* S-2, Tab 1. On December 31, 2002, *based on the evidence in the record at that time,* I granted Grenier's and Shea's requests for a stay. *Grenier* S-2, Tab-4 and *Shea* S-2, Tab 4. I found, in short, that the balance had shifted "and that the agency's professed need to reassign these two appellants based on their poor performance and on a need to correct the office situation in the New Bedford Resident Office (NBRO) where all three appellants worked was not sufficient enough to

outweigh the agency's retaliatory motive; thus, there was a substantial likelihood that Grenier and Shea would prevail on the merits of their appeals and, further, the agency did not meet the criterion of extreme hardship to negate the stay.[7] 5 C.F.R. § 1209.10(b)(2).

With respect to appellant Bock's stay request, I dismissed it on December 31, 2002 based on the fact that he had been granted a postponement of his January 2003 reassignment date—to no later than August 17, 2003—based on DEA's Career Board accepting his reason, i.e., medical emergency, for a delay. *Bock* S-2, Tab 4. At that time I believed the decision in *Grenier et al.* would be issued before August 17, 2003 and thus the granting of a stay would be meaningless. When, that turned out not to be true, Bock, on August 11, 2003, requested, for a third time, a stay of his reassignment. On August 13, 2003, I granted the stay, with no objection from the agency, to be effective until the date on which my initial decision was issued. *Bock* S-3, Tab 3.

ANALYSIS AND FINDINGS

The Board has jurisdiction over an IRA appeal when certain criteria are met.

The Board has jurisdiction over an IRA if an

[7] I found in adjudicating, the second stay requests that Chief Inspector George J. Cazenavette III had actual knowledge of the appellants' whistleblowing disclosures. The evidence presented since that time has caused that finding to be incorrect. Cazenavette had constructive, not actual, knowledge. *See* text *infra*.

appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that (1) he engaged in whistleblowing activity by making protected disclosures under 5 U.S.C. § 2302(b)(8),[8] and (2) the disclosures were a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action under 5 U.S.C. § 2302(a)(2)(A). *See Yunus v. Department of Veterans Affairs*, 243 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 11 (2002).

Each appellant has exhausted his administrative remedies before OSC.

As recounted above, each appellant presented a complaint to OSC on October 8, 2002 and each received a closeout letter from OSC on November 5, 2002. This scenario serves to exhaust each appellant's administrative remedies before OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.5. Thus, I find

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[8] This section states:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial-and specific danger to public health or safety.

that each appellant has met this first jurisdictional criterion.[9]

Each appellant has made nonfrivolous allegations that he engaged in whistleblowing activity by making protected disclosures.

As part of the appellants February 7, 2003 prehearing submission, I required a list of whistleblowing disclosures each had allegedly made. Grenier listed 39 disclosures, Bock 41, and Shea 47. *Grenier* W-l, Tab 23. While I do not agree that each of the listed disclosures constitutes a nonfrivolous

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[9] On February 10, 2003, I issued an order summarizing the prehearing conference I held with the parties on that, date. Therein, I noted my agreement with the appellants that each had certainly raised other personnel actions with OSC in their respective October 8, 2002 complaints. However, I noted that OSC had not addressed these other actions in either its. October 31, 2002 preliminary determination notice or its November 5, 2002 close out letter. Thus, I stated I did not intend to address them in the instant appeal because I doubted satisfaction of the exhaustion requirement. I instructed the appellants to inquire of OSC as to its intention to address the other actions or wait until 120.Jays had passed and file second IRA appeals on those actions. The appellants agreed with this procedure, inquired of OSC (and learned essentially, that OSC had erred in not addressing all personnel actions on November 5, 2002) and subsequently filed second appeals. I dismissed these second appeals without prejudice pending the adjudication of the instant appeal. *See Grenier v. Department of Justice,* MSPB Dkt. No.BN-1221-03-0117-W-1 (Initial Decision JuL. 21, 2003); *Bock* v. *Department of Justice,* MSPB Dkt. No. BN-1221-03-0119-W-1 (Initial Decision Jul. 21, 2003); and *Shea v. Department of Justice,* MSPB Dkt. No. BN-1221-03-0118-W-1 (Initial Decision Jul. 21, 2003). With the issuance of the initial decision today, I am reopening the above-captioned appeals for further processing.

allegation of whistleblowing activity, I find that each, appellant has made several nonfrivolous allegations. I note that only one disclosure need be alleged to meet the second jurisdictional criterion.

With respect to Grenier's allegations at *Grenier W-l,* Tab 23,[10] the record evidence shows that he authored a January 27, 2001 memorandum addressed to his second-level supervisor, Assistant Special Agent in Charge (ASAC) Carol Cooper detailing a meeting he had had the day before, January 26, 2001, with his immediate supervisor, John H. Schaefer; NBRO Resident Agent in Charge (RAC).[11] *Grenier* W-l, Tab 50, Appellants' Exh. F. In that memorandum, he alleged, among other things,[12] that Schaefer had made threatening remarks concerning two DEA, subordinates, i.e., Bock and Shea, and two Massachusetts State Police officers assigned to NBRO's Task Force.[13] Grenier also

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[10] *See also Grenier* S-l. Tab 1.

[11] He had also orally informed her in a telephone conservation about the same matters late in the day on January 26, 2001. I note that cooper is physically located in the New England Field Division, Boston, Massachusetts, Grenier in NBRO, New Bedford Massachusetts.

[12] As with many of Grenier's, Block's, and Shea's communications noted herein, I have recited the most obvious of the statements constituting alleged protected disclosures. This is not meant to exclude other statements each appellant may have made in each of his communications. However, I will henceforth not include "among other things" to denote that possibility.

[13] DEA staffs many of its field offices with special agents like the appellants here and a combination of state and local police

alleged in his list of disclosures that on March 27, 2001 he orally informed Cooper that the problems in NBRO were ongoing. Further, Grenier alleged that on August 14, 2001 he orally informed Cooper that Schaefer was deliberately condescending to task force agents who were not college graduates. Further, Grenier alleged that on December 26, 2001 he orally informed Acting SAC (A/SAC) Thomas Pasquarello that morale was horrible and the NBRO was falling apart and that Schaefer had dry-fired his wepon in the office. Further, Grenier alleged that on December 28, 2001, he had provided Pasquarello documentation that Schaefer had falsified a report involving an undercover reverse sting operation[14] he. (Schaefer) had botched. Further, Grenier alleged that on March 20, 2002, he informed ASAC Rodney G. Benson, who was performing an internal management review of the NBRO and the Cape Cod Task Force (CCTF),[15] that-the NBRO had failed and was an embarrassment to DEA, that, with few exceptions, no other law enforcement agencies would work/with NBRO because of Schaefer, that Schaefer had extorted two local police officers who asked to

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officers. This constitutes what is called a task force. This structure promotes a team effort where each task force member can provide his/her own knowledge and expertise in law enforcement while drawing from the knowledge and expertise of others in the task force. Cazenavette testified that a task force is a force multiplier for DEA's resident offices enabling DEA to better accomplish its mission. Hearing Transcript (HT) 152

[14] This is a procedure whereby an undercover DEA agent poses as a seller of drugs to drug dealers.

[15] This management review will be discussed in detail below.

leave NBRO (i.e., threatened that if they talked about him after they quit the task force, he would have their chief demote them), that Schaefer had traded a hard-working local police officer for another who was reportedly corrupt (and who Schaefer knew had been reported as possibly corrupt), and that Schaefer would falsify reports to show he was present for enforcement activity on the street when he was not.

From, my review of the above, I find that appellant Grenier has made nonfrivolous allegations that he disclosed information which he reasonably believed evidenced either violations of law, rule, or regulation, gross mismanagement,[16] abuse of authority,[17] or substantial and specific danger to public health or safety. In sum, I find he has met the second jurisdictional criterion of making nonfrivolous allegations that he engaged in whistleblowing activity by making protected disclosures under 5 U.S.C. § 23:02(b)(8).

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[16] *See White* v. *Departrrient of the Air Force,* 63 M.S.P.R. 90, 95'(3 994) (for purposes of 5 U.S.C. § 2302(b)(8), "gross mismanagement" is defined as management action or inaction which creates-ia-.substantial risk of-significant adverse impact upon the agency's ability to accomplish its mission).

[17] *See Pulcini v. Social Security Administration,* 83 M.S.P.R. 685, ¶ 9 (1999) (an "abuse of authority" is defined AS an "arbitrary or capricious exercise of power by a Federal official or employee-that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons") *aff'd,* 250 F.3d 758 (Fed. Cir. 2000) (Table).

With respect to Bock's allegations at *Grenier* W-l, Tab 23,[18] the record evidence shows, via a. February 1, 2001 memorandum authored by Cooper,[19] that Bock orally informed Cooper in a January 24 or 25, 2001 meeting that Schaefer would lie or change a decision because he forgets what was said 5 minutes earlier and that the language Schaefer uses berates people: *Grenier* W-l, Tab 50, Appellants' Exh. G. Bock also alleged that in the same meeting with Cooper, he told her that Schaefer had been seen wearing his ballistic helmet backwoods while eating lunch and staring into space, that he (Bock) believed Schaefer was mentally ill, that he (Bock) and others were concerned for their safety and felt Schaefer could "go off" at any minute, and that Schaefer displayed irrational behavior. Bock also alleged in his list of disclosures that he orally informed Cooper on August 21, 2001 that Schaefer consistently lied, that Schaefer had a mental problem, i.e., narcissistic personality disorder, that Schaefer was subject to mood swings and temper tantrums and often stared into space, that Schaefer was inconsistent in. his policies regarding operation plans when conducting surveillance, and that Schaefer, after an altercation with a task force officer, changed the location of his pistol from his ankle to the small of his back. Further, Bock alleged that in his March 20, 2002 interview with Benson during the management

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[18] *See also Bock,* S-l, Tab 1.

[19] This memorandum was essentially a written summary of what Cooper learned from NBRO personnel interviews on January 24 or 25, 2001.

review, he told Benson that Schaefer had at one point issued a physical challenge to one of the task force officers, i.e., to settle their differences outside, that Schaefer because of his incompetence, had botched a reverse sting operation, and that Schaefer had improperly exposed DEA to *Giglio* concerns[20] because of his acceptance on the NBRO Task Force of two allegedly corrupt local police officers.

From my review of the above, I find that appellant Bock has made nonfrivolous allegations that he disclosed information which he reasonably believed evidenced either violations of law, rule, or regulation, gross mismanagement, abuse of authority, or substantial and specific danger to public health or safety. In sum, I find he has met the second jurisdictional criterion of making nonfrivolous allegations that he engaged in whistleblowing activity by making protected disclosures under 5 U.S.C. § 2302(b)(8).

With respect to Shea's allegations at *Grenier* W-1, Tab 23,[21] the record evidence shows, via a, February 1, 2001 memorandum authored by Cooper, that Shea orally informed Cooper in a January 24 or 25, 2001 meeting that the NBRO was in total chaos - because of Schaefer, that Schaefer makes inconsistent statements and does not trust people, and that Schaefer has a personality disorder. Shea also alleged in his list of disclosures that he told

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[20] *Giglio* arise when a law-enforcement officer called to testify at a criminal trial has to admit being involved in criminal/dishonest conduct himself.

[21] *See also Shea,* S-1, T.ab 1

Cooper on January 24 or 25, 2001 that Schaefer is a pathological liar, that Schaefer's ineffective management reflects not only on himself (Schaefer) but DEA as a whole, and that many of the task force officers were contemplating returning to their respective departments because of Schaefer's irrational behavior and manipulation. Further, Shea alleged that in a March 27, 2001 meeting, he orally informed Cooper that NBRO had a hostile work environment, that he (Shea) felt that Schaefer was deliberately out to get revenge on him for previously informing Cooper about his (Schaefer's) problems, that Schaefer repeatedly lied and sometimes even denied having case-related discussions with him, that his (Shea's) life and the lives of others were in jeopardy because of Schaefer's obvious hostility, and that other members of the task force were leaving because they could not tolerate Schaefer's lies and deceit.[22] Further, Shea alleged that on September 10, 2001, he orally informed Cooper that Schaefer told him he had better watch his back, that Schaefer was setting him up as a scapegoat for his own mismanagement and failures, that Schaefer was irrational, unstable and dangerous, and that Schaefer had sworn to get revenge on another agent if it was the last thing he ever did. Further, Shea alleged that on December 19, 2001, he orally informed then SAC Vincent J. Mazzilli that Schaefer failed in his duties as a commanding supervisor in an undercover reverse sting operation almost resulting in the death of an

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[22] Both Grenier and Bock allegedly stated to Cooper in the same meeting on this date (a meeting between Cooper and all three appellants) that they -concurred with these particular disclosures of Shea. *Grenier* W-1, Tab 23.

agent, that he (Shea) was being targeted as a fall guy for Schaefer's failures, and that Schaefer had probably concealed information about the alleged corruption of a local police officer at a time when that officer was about to be appointed as a task force officer. Further, Shea alleged that on December 28, 2001, he orally informed then A/SAC Pasquarello that Schaefer failed in his duties as a commanding supervisor in an undercover reverse sting operation almost getting people killed, including, members of the public. Further, Shea alleged that in his March. 20, 2002 interview with Benson during the management review, he told Benson that Schaefef caused a lot of problems with state and local authorities which led them to leave DEA, that Schaefer created factions and intrigue as mechanisms of control, and that Schaefer deflected his failures on everyone else. In addition, Shea provided Benson examples of two cases which Schaefer allegedly poorly managed.

From my review of the above, I find that appellant Shea has made nonfrivolous allegations that he disclosed information which he reasonably believed evidenced either violations of law, rule, or regulation, gross mismanagement, abuse of authority, or substantial and specific danger to public health or safety. In sum I find he has met the second jurisdictional criterion of making nonfrivolous allegations that he engaged in whistleblowing activity by making protected disclosures under 5 U.S.C. § 2302(b)(8).

Each appellant has established by a preponderance of the evidence that his disclosures were a contributing factor in the agency's decision to propose his reassignment.

It is clear that a, reassignment action is a personnel action covered under the whistleblower law. In fact, it is specifically enumerated in the law. *See 5* U.S.C. § 2302(a)(1)(A)(iv). Moreover, the law provides that:

> The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—(A) the official taking the action knew of the disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

5 U.S.C § 1221(e)(1).

On February 24 and 25, 2003, I held the first part of the bifurcated hearing in the consolidated appeal. This was as a result of what I found to be a viable agency allegation that the agency officials who recommended and decided the appellant's reassignments had no actual or constructive knowledge of the appellants' whistleblowing activities at the time those officials acted on the

reassignments.[23] *Grenier* W-l, Tab 26. After the hearing concluded, I found in an April 14, 2003 order, *Grenier* W-l, Tab 39, and I repeat that finding here, that the recommending and deciding officials in the reassignment actions had constructive knowledge of the appellants' disclosures. *See McClellan v. Department of Defense'* 53 M.S.P.R. 139, 147 (1992) (reprisal can be shown by establishing that a person with only constructive knowledge of the appellant's disclosure can influence the official taking the action against the appellant). Consequently, I further find that each appellant has met the "knowledge" part of the above-cited law.[24] Further, I found in my April 14, 2003 order, and I repeat that finding here, that each appellant's disclosures during 2001 and 2002 were made within such a period of time of the September 26, 2002 decision to reassign that a reasonable person could find that they contributed to the action. *See Easterbrook* v. *Department of Justice,* 85 M.S.P.R. 60, 67 (2000). (personnel actions occurring within slightly more than 7 months of disclosure met "timing" test).

In view of the above, I find that each appellant has established by a preponderance of the evidence that his whistleblowing disclosures were a

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[23] The agency representative stated that information leading to this allegation had just then recently been acquired. It was not known during the adjudication of the stay requests.

[24] I will provide the factual analysis for this finding when I otherwise analyze the clear and convincing issue below. It will be more easily understood this way.

contributing factor in the agency's decision to reassign him.[25]

The agency has established by clear and convincing evidence that it would have taken the same actions' absent the appellants' whistleblowing activity.

Because the appellants have met the jurisdictional criteria in their IRA appeals, I now turn to the merits of the appeals. In determining the merits of an IRA appeal, the Board examines whether an appellant has established by a preponderance of the evidence that he engaged in whistleblowing activity by making a protected-disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in the personnel action. If so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. 5 U.S.C. §§ 1221(e) and 2302(b)(8); *see Spencer v. Department of the Navy*. 327 F.3d 1354, 1356-57 (Fed. Cir. 2003). The Board may resolve, these merits issues in any order it deems most efficient. *See Dick v. Department of Veterans Affairs,* 290 F.3d 1356, 1363-64 (Fed Cir. 2002); *Rusin* 92 M.S.P.R. at ¶ 20 n.9. I find it most efficient here to bypass the issue of whether the appellants have established by preponderant evidence that they engaged in whistleblowing activity (remembering

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[25] This means that each appellant has gone beyond merely meeting the jurisdictional criterion by making a nonfrivolous allegation that his disclosures were a contributing factor in the agency's decision to reassign him. Rather, I have found that he has actually proven that a contributing factor exists.

that I have, already decided that the appellants have proven by preponderant evidence that their whistleblowing activity was a contributing factor in the agency's decision to reassign them) and proceed to the issue of whether the agency showed by clear and convincing evidence that it would have taken the same reassignment actions absent the whistleblowing activity.

Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a Higher standard than the "preponderance of the evidence" standard. 5 C.F.R. § 1209.4(d). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See, e.g., Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The strength of the agency's evidence in support of its action

The Board's authority in an IRA appeal is limited to adjudicating whistleblower allegations. The Board lacks the authority to adjudicate the

merits of the underlying personnel action, here the reassignment of each appellant. *Lewis, v. Departmen of the Army,* 63 M.S.P.R. 119, 125 (1994), *aff'd,* 48 F.3d 1238 (Fed. Cir.) (Table), *cert, denied,* 516 U.S. 834 (1995). Said another, way, it is not for the Board to decide if it would have reassigned the appellants (knowing all the information that has been gathered in this appeal process) if the agency has otherwise shown that there was clear and convincing evidence for effecting the reassignment actions it did.

In the matter of the appellants' reassignments, the deciding official was Rogelio E. Guevara, the Chief of Operations, DEA.[26] Guevara testified that he. first occupied his current position in June 2002. Hearing Transcript (HT) 13, 1052. He made the decision to reassign the appellants, each one of them, on September 26, 2002, only several months later. HT 9-10. The basis of his decision was a memorandum of that same date forwarded to him by Chief Inspector George J. Cazenvette III, Office of Inspections (IN),[27] recommending the reassignments. T 19; *Grenier* W-l, Tab 50, Apellants' Exh. YY. Guevara testified that he was privy to the contents of the memorandum because of a previous discussion with Cazenavette about it, *see infra,* and he had done certain research prior to receiving the memorandum. Thus, upon actually receiving it, he

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[26] Guevara testified that he is the only official authorized to effect a reassignment of a special agent from one division to another. HT 34

[27] Guevara and Cazenavette are in separate organizational entities in DEA. One is not subordinate to the other. Both report directly to the Administrator of DEA through the Deputy Administrator.

was prepared to go forward with the reassignments. HT 19.

The research he had done consisted of reviewing a report in which he had been much involved, when he first took over as Chief of Operations several months before called the "Domestic Field Divisions' Special Agent and Support Personnel Resource Requests." HT 1052; *Grenier* W-l, Tab 50, Appellants' Exh. EEEE. According to Guevara, this report concluded that the domestic threat from drug trafficking was principally along the Southwest U.S. border. A second phase of the study resulted in a recommendation that DEA realign its resources to meet the drug threat along that border and that about 37 agent positions be transferred there. HT 20, 1054. Thus, Guevara recognized a dire need to staff the Southwest U.S. border with agents, and, although he could send many new agents just graduating from the agency's training academy, plus agents returning from overseas assignments, he also saw, in the appellants' reassignments, an opportunity to send "some seasoned help to try to mentor these brand new agents." HT 47-48.

Guevara also pointed to a May 30, 2002 letter from the. SAC, El Paso Field Division reinforcing the problems his office faced keeping up with the workload in that area. HT 1061; *Grenier* W-l, Tab 50, Appellants' Exh. EEEE at DEA00136. He also noted that the Federal Bureau of Investigation was "standing down about 400 FBI agents from the business of drug enforcement" and that the New

England Field Division (NEFD) was overstaffed with agents. HT 47-48, 1056-57.

Guevara was privy to the contents of the September 26, 2002 memorandum because he had spoken, with Cazenavette in early September when the latter had returned from an Office of Inspections on-site inspection (i.e., "headquarters inspection") of NEFD. At that time Cazenavette informed Guevara that the enforcement operations of the NBRO were dismally deficient, that critical elements associated with the enforcement of drug laws were also deficient, such as evidence handling, and that the agents at NBRO were not conducting and carrying on the business of the DEA like senior agents and were not showing the type of leadership that senior agents should be providing in a task force setting. HT 22. Cazenavette added that the office had not initiated any major drug trafficking investigations in some time, that the agents had not established a confidential informant in over a year, and that the agents were doing nothing more than preparing summary reports after state police officers would make arrests. What was lacking, Cazenavette told him, was a true DEA presence in terms of follow-up investigation, an attempt to identify, the sources of supply bringing narcotics into the community. HT 42. Cazenavette specifically identified the three appellants as blameworthy because of their lack of attention to detail and cavalier attitude about their responsibilities. According to Cazenavette, the appellants displayed a disregard for their responsibilities to the extent, as the inspectors were told, that they only collected evidence during business hours. Guevara noted that this was "very

unusual because DEA agents work day and night regularly and work horrible hours to try to catch these traffickers." HT 43, Guevara testified that Cazenavette did not tell him anything about NBRO's RAC Schaefer, e.g., that he was mentally unsound. Furthermore, although the RAC would be the logical place to focus the blame, Guevara understood Schaefer was gone, i.e., retired, and "I was concerned with what was going on with the office then and why it was deficient." HT 43-44.

Guevara further testified, in essence, that he had no contact with anyone or anything else in making his decision to reassign the appellants. Specifically, he did not know the appellants, he did not speak to their then SAC, Mark V. Trouville, until after he had decided to reassign the appellants, he never spoke to Schaefer, and he was not involved in any way with the August 2002 headquarters inspection. HT 8, 21. Most importantly, Guevara testified, he never read AS AC Benson's March 2002 management review. HT 55, 58; *Grenier* W-1, Tab 50, Appellants' Exh. HH. This is crucial because that review, in essence, exposed the appellants as whistleblowers and recommended, among other things, "systematic, across the board transfers/removal of all assigned (NBRO) personnel." *See infra.*

Guevara testified that he never read Benson's Management Review despite being forwarded a copy of it on August 13, 2002 by Trouville. HT 55, 58; *Grenier* W-1, Tab 50. Appellants' Exh. PP. Guevara explained that, at his level, he would not look at a management review; it would be for the SAC who

ordered the review to entertain. Otherwise, Guevara's subordinate, the Domestic Chief of Operations, who coordinates with the SACs, would see a management review and assist the SAC with it. HT 33. Guevara added that many times "a lot of paper comes into my office where subordinate DEA managers feel that this has to be routed to me, whether in fact it is necessary or not" and he does "not read every piece of paper that comes to him." HT 30, 34. He would never do research into a document like a management review because it is in much more detail than he would get into; rather, he would take it at face value. HT 59.

But, Guevara admitted to reading the September 26, 2002 memorandum from Cazenavette entitled "Recommendation for Transfers: Special Agents Chris Grenier, Todd Shea, and Paul Bock, New Bedford Resident Office, Boston Division." HT 19. A review of this document reveals that much of it is a recapitulation of what Cazenavette had previously informed Guevara during their early-September discussion. However, on the second page, it contains the following relevant statements:

> A review of other inspection related documents revealed that a Management Review of the situation in the New Bedford RO was conducted earlier in the year at the direction of SAC Trouville. Part of that review centered on the relationship between the New Bedford RO and the Massachusetts State Police. In an interview with SAC Trouville, he stated

> that SAs Grenier, Shea, and Bock failed to support DEA and its mission, and in fact actively supported the position of the Massachusetts State Police against DEA's interests. Additionally, an interview with a Task Force Officer raised concerns that SAs Grenier, Shea, and Bock were not following established policies and procedures, thus exposing DEA to unnecessary liability. The TFO stated that the total disregard of DEA's CS [i.e., confidential source" or informant] policy by Grenier, Shea, and Bock would lead to a "Whitey Bulger" incident (a reference to a widely publicized scandal involving the improper handling of organized crime informants by FBI agents).
>
> Based upon the results of the on-site inspection, and in concurrence with the management review conducted by the Boston Division, I recommend that SAs Grenier, Shea, and Bock be relocated to other divisions.

Grenier W-.1, Tab 50, Appellants' Exh. YY.

Initially, I find, from a review of the four corners of this document, that, *without reading the referenced management review itself,* a reasonable person would not realize that the appellants were whistleblowers. There, is absolutely nothing in the words quoted above to indicate that any of the appellants had made a protected disclosure; Rather,

all it indicates is that there was a rift in the office between DEA and the-Massachusetts State Police and that the appellants sided with the latter. It does not say, as the Management Review itself does, what the rift concerned. Also, it does not reveal anything about Schaefer's role in the rift or what the appellants were either saying or doing relative to it nor does it intimate in any way that either Schaefer or the quoted task force officer were the subjects of some of the appellants' whistleblowing disclosures.

Not surprisingly then, Guevara did not have actual knowledge of the appellants' whistleblowing activity.[28] I note that Guevara testified he was aware that there was some kind of controversy between DEA and the Massachusetts State Police and that the appellants had sided with the latter. But he did not recall the details of it and, he stated, it was of no consequence in his decision making. HT 47, 72.

In essence then, Guevara's decision to reassign was based on the reasons stated in Cazenavette's September 26, 2002 memorandum, which, as mentioned above, was a recapitulation of what Cazenavette orally informed him in early September, and the documented immediate need for more agents on the Southwest U.S. border, and the

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[28] What is surprising is that neither- party, specifically, asked Quevara, in either his February 24, 2003 or June 17, 2003 hearing appearances, whether he had actual knowledge, before making his decision to reassign the appellants, that they were whistleblowers. However, I find it is otherwise clear from all his other statements that he did not have actual knowledge, albeit he had constructive knowledge. *See* text *infra*.

financial wherewithal to effect the reassignments, an amount estimated at $350,000.

With respect to this latter point, Guevara testified that he had his executive assistant find out before he ordered the subject reassignments whether there was PCS (i.e., permanent change of station) money available. HT 60-61. He said there would be no point in deciding to reassign anyone if there was. no .financial resource to accomplish it. HT 49. The answer came back in the affirmative and he did not otherwise inquire into the amount because PCS moves "are all so different," but he did know it would be "a lot of money." He also realized that he had to effect the reassignments before the beginning of the new fiscal year (i.e., October 1, 2002) when he expected, from past experience, that there would be a continuing resolution and a block on the expenditure of. Items such as PCS money.[29] HT 61-62. .

Guevara did not ask Cazenavette if the appellants had been counseled or put on a performance-improvement plan. HT 70. This was not his focus. The "fact that their performance was questionable was not why I transferred them." HT

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[29] Indeed, the agency's Chief Financial Officer issued a directive sometime in September 2002 stating, that DEA would begin FY 2003 under a continuing resolution and particularly directing that "PCS decisions should be postponed except for the most mission-critical PCS transfers." *GrenierW-l,* Tab 50, Appellants' Exh. VV. However, it is clear that the directive addresses funds to be expended in FY 2003 and has no relevance to FY 2002 expenditures such as the PCS moves here.

1062. The conclusion he reached from Cazenavette's September 26, 2002 memorandum and their early September discussion was that "here we had three agents who had quite a bit of time on the job and I would consider senior agents and (they) were not providing the type of leadership, by way of leading these investigations, and were not fully carrying out their responsibilities. And I was faced with a situation where we had gaping needs in the southwest border." HT 44.

Guevara testified that he called Trouville on September 26, 2002 or the day before[30] to learn whether Trouville could backfill the three NBRO agent positions.[31] HT 1060, 1068-69. Trouville told him that this could be accomplished, albeit Guevara, who is ultimately responsible for all agent reassignments, subsequently reassigned to NBRO a newly graduated agent from the academy. HT 1078.

It is to be noted that even though the agency has agents sign a mobility agreement, as the three appellants did here, *Grenier* W-l, Tab 50, Agency Exh. 3A-C, stating that mobility is a condition of employment, it is rare that an agent is involuntarily reassigned as happened in this case. The fact is that Guevara would not have reassigned the appellants

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[30] Trouville's handwritten notes show that Guevara called on September 26, 2002.*Grenier* W-l, Tab 50, Appellants' Exh. DDDD.

[31] Backfilling means reassigning special agents within a division so a particular office like NBRO is not left without sufficient staff to perform its mission.

were it not for Cazenavette's recommendation following the August 2002 headquarters inspection.

From my review of Guevara's testimony and from observance of his demeanor while testifying (twice) at the Board's hearing, I found his testimony entirely credible. He was consistent throughout, no other evidence contradicted his testimony, none of what he said was inherently improbable, and I found him to be honest and forthright. *See Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458-62 (1987) (to resolve credibility issues administrative judge must apply certain factors).

In view of all of the above, I find that Guevara's reasons for reassigning the appellants are strong. The agency needed agents on the Southwest U.S. border, particularly seasoned, i.e., experienced, agents, at the same time Guevara reasonably perceived that three experienced agents needed to be reassigned away from a situation where they were not performing acceptably and at a time when there were ample resources to effect the moves. The confluence of these three reasons in September *2002,* I find, strongly supports the reassignment actions. The only way such evidence could be found not sufficiently strong is if Guevara's perception relative to the appellants' performance was unduly influenced by reprisal for whistleblowing. And, in turn, the only way undue influence along these lines could have occurred is if it came from Cazenavette, either alone or through others, for example, any of-Cazenavette's IN subordinates, particularly the inspectors who investigated the NBRO.

It is clear that Cazenavette, the Chief Inspector from January 2002 to May 2003, and now retired, had no knowledge of the appellants or Schaefer or the NBRO from any discussions with anyone or from reading any document before he arrived in Boston to partake in the NEFD's headquarters inspection on August 29, 2002. HT 996-97. The first he heard anything at all about the situation in NBRO was on the evening of August 29, 2002, when one of his senior inspectors, Richard M. Dearing, met him in a chance encounter at a restaurant in downtown Boston.

Dearing was an inspector in whom Cazenavette had much confidence. Cazenavette testified that although he had only known Dearing from the time he became the Chief Inspector in January 2002, he considered Dearing to be a very good investigator and a capable agent. He was known as a go-to individual in the office. Cazenavette respected his opinion, was impressed with his knowledge, and recognized him as one who could grasp a situation, i.e., "cut to the chase real quick and get to the meat of the subject." HT 1044- Cazenavette's and Dearing's August 29, 2002 conversation lasted about 30 minutes. HT 91. In that time Dearing told Cazenavette, among other things, that: the appellants had lost sight of the fact they were DEA agents; they had aligned themselves too closely with the Massachusetts State Police;[32] they

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[32] There was much testimony about what "aligned with the Massachusetts State Police" meant. The record evidence shows in fact that it meant different things to different people. Cazenavette's take on it, as it was introduced to him by Dearing (but no specifics or a definition from Dearing), was

were basically relying on the state police to bring them cases; they were not leading, but were following the state police in case work; the office was split into factions; the appellants had disregard for DEA policies and procedures to the point where they were not conducting the level of investigations they should; they had absolutely no regard for DEA's authority; they were senior agents who were basically doing nothing; they had collateral duties they were not doing; and they provided dishonest and flippant .answers to the inspectors, essentially

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that it concerned basically the type of work that was being done by the state police—not the type of work DEA expects from, its agents—and the appellants' adoption of that type of work as their own. However, Cazenavette appeared to also believe that it had something to do with the philosophy of the state police and the appellants following that policy, and/or the appellants taking the side of the state police in the rift that had developed in the office between the state police and Schaefer. Cazenavette testified he never really knew the details of the so called alignment. HT 138-39, 141. From the appellants' perspective, knowing intimately the history of the rift that had developed over the few years of Schaefer's tenure in the Cape Cod and New Bedford offices between Schaefer and certain Massachusetts State Police task force officers, it meant something else. It meant that they had sided with those officers in the complaints the officers had made about Schaefer's violation of laws, rules, and regulations, gross mismanagement, and abuse of authority. However, someone not knowing this history would first likely conclude, I find, that "siding" or" "aligning" with the state police meant only that ah agent favored the way the state police-did things, e.g., processed cases, and-took their side in any dispute about how things, should be done vis-a-vis how their DEA supervisor wanted things to be done.

lying to them,[33] being adversarial, and showing them disrespect. HT 92-93, 95, 122, 138, 159-60, 1046-47. Cazenavette said that "the thing that exacerbated the whole situation was the demeanor of these agents towards our inspectors. I mean we're all carrying the same badge." HT 1555. I note that Bearing's testimony on certain of the above points is entirely consistent with Cazenavette's testimony.[34] HT 394-403.

The only mention of a RAC being involved in the situation was Dearing's statement, in response to Cazenavette's inquiry of who he was, that the RAC had retired[35] and there was an Acting RAC present but had been there for only a short period of time, i.e., 4 days. HT 94. Cazenavette testified that if the RAC, i.e., Schaefer, was not retired, then he "would have been in play." HT 123. He would have

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[33] This issue of lying, or lack of candor, has proceeded forward to an Office of Professional Responsibility investigation. Cazenavette testified that he understood

[34] Dearing was not asked to list all the points he made to Cazenavette on the night of August 29, 2002.

[35] Apparently, Schaefer was not officially retired on the date Cazenavette and Dearing met. But he had cleared out of his office "in the middle of the night" the week before the headquarters, inspection and was never seen by NBRO personnel again. It was reported to the inspectors that he was retired and they did not look behind that statement. Evidently, Schaefer was allowed to use up some sick leave before he officially retired, ostensibly at the end of August 2002 (the date of his retirement was never introduced into evidence). However, in view of the circumstances, I find, as a practical matter, that during the headquarters inspection Schaefer was gone and unavailable.

recommended Schaefer be reassigned and demoted based on the condition of his office since it was obvious he was not giving guidance, not directing, not doing anything.[36] HT 125.

However, despite Schaefer's incompetence, recognized by Cazenavette and others, *see infra,* this fact, according to Cazenavette, did not absolve senior special agents like the appellants from doing their job special agents like' the appellants from doing their job. They should be self-sufficient, "doing something," making cases, initiating informants, "everything that we do;" "you're/supposed to lead." HT 126-27. He did "not buy into" the argument that Schaefer prevented the appellants from properly performing. From his own experience, sometimes it is necessary to go around the RAC in order to get the job done. In essence, a senior agent should be able to do this and the appellants here should have done it. HT 123, 981.

I note that Dearing never, during his August 29, 2002 conversation with Cazenavette or at any other time, made a recommendation to Cazenavette that the appellants should be reassigned. Also, Cazenavette never told Dearing that he was going to recommend reassigning the appellants. HT 96, 398.

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[36] Cazenavette stated that one of the reasons he accepted the job of Chief Inspector was to "turn this ship around and direct our efforts at looking at management, identifying good managers and awarding them, and taking managers that aren't good and exposing them, holding the managers accountable for their offices." HT at 126.

It is otherwise clear from the record evidence that Cazenavette, based on his confidence in Dearing, believed Dearing's statements about the appellants, took them at face value, and never thereafter questioned them. Indeed, he totally relied on Dearing's statements when he determined to recommend to Guevara that the appellants be reassigned. In effect, he never changed his opinion after that August 29, 2002 evening discussion with Dearing. Cazenavette added that all the decisions he makes as Chief Inspector are based on briefings, sometimes short ones; he relies on his senior inspectors and the SESers, i.e., upper management officials, who are supervising them to accurately provide him information. HT 1008.

Cazenavette testified that it was the next morning, the morning of August 30, 2002, after thinking about the matter "the whole way," when he made up his mind he would recommend the reassignments. HT 160-61. He then proceeded to SAC Trouvlle's office and, before Trouville could say anything, he informed Trouville that he planned to recommend the appellants' reassignments, HT 111, 161-63. At that point, according to Cazenavette, Trouville said that he had earlier directed a management review and, as a result of it, he had noted a performance issue with the appellants, had called them into his office and told them that they were too closely aligned with the state police.[37] HT

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[37] Trouville testified that he made this determination to recommend the appellants' reassignments as soon 'as Cazenavette had finished saying he was going to do it. He had the appellants come to his office on August 13, 2002 and, according to the appellants and to some extent Trouville

119-20. Cazenavette testified that Trouville asked him to back off his recommendation and let him make it. Cazenavette declined, stating that Trouville could make any recommendation he wanted but that his (Cazenavette's) recommendation was based on the results of his inspection and he intended to follow through with it. HT 120. Trouville's testimony on this meeting comports in all important details with Cazenavette's. HT 244-47. The record further shows that Trouville never made a recommendation to reassign.[38] HT 265.

Cazenavette credibly denied ever reading Benson's Management Review even though it was cited in his September 26, 2002 memorandum.[39] HT 114. After Trouville made him aware of its existence on August 30, 2002, he directed his deputy to make it part of the headquarters inspection file but only so that file would be complete. He wanted Guevara to

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himself, told them, in essence, that if they did not shape up, he would reassign them to the Southwest U.S. border "as fast as their heads could spin." However, he had taken no action on this threat as of August 30, 2002 when he met with Cazenavette.' But Cazenavette convinced him this is what he (Trouville) should do because it corroborated what he believed and he agreed with Cazenavette. HT231.

[38] If he had, the analysis in this case would be quite different.

[39] Cazenavette did not author the memorandum. Cazenavette told his deputy to write the September 26, 2002-memorandum and told him specifically what he wanted in it. HT 128-29, 501, 504. Dearing testified that he put the "meat and potatoes" in the memorandum, "especially the issues pertaining to the different findings that we had in (NBRO)." HT 3 89-90. From Dearing, the draft went up through the chain of command to Cazenavette who signed it.

be aware that another document existed on the same subject—to be fair to Guevara and to give him the option of looking at it. But he (Cazenavette) would never read such a document. HT 114-15, 129. Thus, I find that Benson's Management Review had no effect on Cazenavette's recommendation to reassign the appellants

As with Guevara, from my review of Cazenavette's testimony and from observance of his demeanor while testifying (twice) at the Board's hearing, I found his testimony entirely credible. He was consistent throughout, no other evidence contradicted' his testimony, none of what he said was inherently improbable, and I found him to be honest and forthright. *See Hillen,* 35 M.S.P.R. at 458-62.

The appellants alleged that Dearing and several other DEA employees had gained knowledge of the appellants' whistleblowing disclosures either independently or from reading Benson's Management Review and that they, in turn, passed on such knowledge to Cazenavette. They also intimated that if Dearing had this knowledge—and any adverse opinion that came along with it—it may well have caused him to slant his findings, i.e., he would be prone to look for errors in the appellants' work where there were none or exaggerate any errors that did exist. This then would have tainted Dearing's findings, his report to Cazenavette on August 29, 2002, and, ultimately, Cazenavette's determination to recommend the appellants' reassignments. The appellants pointed to Dearing's supervisors, Charles. H. West, Deputy Chief

Inspector, IN, and Lee Wayne Nicks, Associate Deputy Chief Inspector, IN,[40] and they also pointed to Schaefer, Trouville and Cooper.

Thus, I will examine what employees had knowledge of the appellants' disclosures and whether, if they did, they passed it on, directly or indirectly, to Cazenavette *before he made the determination on August 30, 2002 to recommend their reassignments.* I note my finding above that Cazenavette made up his mind on August 30, 2002 to recommend the appellants' reassignments and never wavered from that determination after he announced it to Trouville.

In order to understand the import of Benson's Management Review on the clear and convincing-evidence issue, as well as on the knowledge issue, I recite the following statements from that review which, I find, relate directly or indirectly to the appellants' alleged whistleblowing disclosures:

- Several interviewees described an incident in January 2001 when Schaefer was called to Boston to meet with Cooper and rumors

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[40] Nicks serves as West executive assistant. HT 502. According to West, he "basically wanted him [Nicks] to kind of draw back on this one [the NEFD headquarters inspection] because he was here before and he could have some culpability." HT 503. What he meant by this was that Nicks had only recently come to IN in November 2001 from & ASAC position in NEFD (where he served 7'years) and" he could have been involved in some program area errors while an ASAC on which IN would be making findings. Despite this, Nicks was in Boston for the closeout session during the second week of the inspection and spoke to West on occasion then. HT 489-90.

circulated that Schaefer was to be removed from the office. After the meeting, several of the interviewees heard Schaefer was coming back to the office. Some staff members indicated they affixed weapons to their belts while others left the office entirely. This was done as a safety precaution as it was speculated that Schaefer had" been; relieved of his position and would be in a very unstable mental state—capable of "going postal."

- Because of poor -decisions made by Schaefer regarding personnel and case management, the perception of those interviewed (the appellants were among these) was that Schaefer is the cause of NBRO having such a high turnover of task force officers;'
- Each person revealed that the underlying problem revolves around DEA's relationship with the Massachusetts State Police and Schaefer's mental state.
- Regarding this menial state, the consensus of those interviewed was that Schaefer is mentally unstable; he appeared to be preoccupied, forgetful, and_ subject to unpredictable mood swings.
- On one occasion Schaefer sat alone at his desk, eating lunch with a Kevlar helmet on backwards (this was described as irrational behavior and not meant to be a joke). On another occasion he sat at his desk dry firing a pistol at a time when tension-in the office was particularly high.
- Schaefer was accused of not allowing the agents and task force officers to do their jobs.

- As a result of ongoing problems, the NBRO had been ineffective to the point that very little enforcement action had even been attempted.
- During an undercover reverse sting operation, Schaefer made several tactical and judgmental errors that resulted in the escape of several suspects. Later, an after-action meeting did not include three arrest team members making the critique mostly ineffective. Also, Schaefer rewrote the arrest report to. Support his position and the original report disappeared.
- Schaefer allegedly threatened Grenier.
- A New Bedford police officer, recently appointed as a task force officer, should not have-been appointed because there was a report that he may have been involved in a tow company kickback scheme.

Grenier W-l, Tab 50, Appellants' Exh. HH. In addition to the above, Benson implied in. Ms narrative that the appellants (and others) had been reporting some of the above allegations to Cooper.

Dearing testified that he learned on the Wednesday (i.e., August 14, 2002) before the headquarters inspection of NEFD that he was; going to the New Bedford and Cape Cod offices of NEFD. HT 338. On August 14, 2002, Dearing attended the "mountrout," an essentially logistical meeting of all those IN employees involved in it NEFD inspection. This was about 30 employees. At some point before going to New Bedford, Dearing received the customary notebook put together for the inspectors.

This notebook contained certain statistical information about the division as provided by headquarters offices, the last headquarters inspection report on the division, and the last division inspection report[41] conducted by the NEFD. HT 343. Benson's Management Review was not in the notebook. Such a document would not normally be part of the notebook because. IN does not want to prejudge what it might find as a result of its own inspection. HT 498, 555. And Dearing did not see the review until after he inspected the NBRO. He had then arrived at certain conclusions about the office and about the appellants, and wrote his draft findings. This all occurred on August 19-21, 2002 and he first saw Benson's Management Review on or about August 28, 2002, just prior to his August 29, 2002 30-minute conversation with Cazenavette.

Dearing further testified that he did not discuss with West, his second-level supervisor, the NBRO headquarters inspection before he went to New Bedford. HT 346-47. Otherwise, there is no evidence to show that West ever discussed Benson's Management Review with Dearing. Although West had received Trouville's August 13, 2002 memorandum forwarding the management review,[42]

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[41] This is also referred to as a self-inspection and is mandated by IN. Division inspections are normally performed yearly by some of the division's ASACs and are accomplished between-aperiodic, usually 3-year, headquarters inspections. They cover some of the same program areas as a headquarters inspection.

[42] That one-page memorandum stated, in pertinent part:

> Based on the review conducted, I believe that there has been a history of mismanagement and lack of

Grenier W-1, Tab 50, Appellants' Exh. PP, West testified that he only glanced at the memorandum, never read the review,[43] but forwarded it on to Nicks who he expected might forward it on to the senior inspectors inspecting the NEFD.[44] HT 483-84, 496-97, 555. West did not mention Trouville's memorandum to anyone, not even Cazenavette when they met briefly before speaking with Trouville on August 30, 2002 HT *486*. West "didn't think about" Trouville's memorandum even when Cazenavette mentioned there was a problem with three agents in NBRO. HT 494-95.

For the same reasons that I found Guevara and Cazenavette credible, I find West equally so. In view of all of the above, I find that West did not have, and therefore did not pass, on, any knowledge of the appellants' whistleblowing disclosures to

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> appropriate oversight in both (NBRO and CCTF) offices. The combination of ineffective or "Acting" DEA supervisors and the presence of very senior Massachusetts State Police (MSP) officers led to the abdication of DEA's leadership role in the offices. RAC Schaefer, upon his arrival, did not possess the needed diplomatic nor management skills to properly assert DEA's leadership role. His heavy handed attempts appear to have been met with rebellion not. only from the MSP officers, but also from several of our Special Agents.

[43] West testified that if he read documents like this one he would be reading from morning to night. He said of such document: "I funnel it down to where it needs to go." HT497.

[44] Bolstering my finding that neither West, nor Guevara, nor Cazenavette, ever read Trouville's August 13 2002 memorandum is that, according to Trouville, he never received any feedback on it. HT 220.

Dearing or Cazenavette before the latter determined to recommend reassignment of the appellants.

Dearing testified that Nicks, his immediate supervisor, chose him to be the senior inspector for the NBRO and CCTF because of all the problems they expected to find in CCTF as reported in the division inspection. Before Dearing went to New Bedford, Nicks told him there were some issues in CCTF with the Massachusetts State Police. According to Dearing, "There really wasn't a whole lot of discussion on New Bedford." HT 652-53.

After Dearing finished the NBRO inspection on August 20, 2002, he called Nicks on August 21, 2002 from Cape Cod. He did so for two reasons: to inform Nicks of the number of problems and findings in NBRO (he had "never seen that many findings in any one office before in my entire tenure in inspections") and to recommend referral for Office of Professional Responsibility (OPR)[45] investigation Shea's alleged lack of candor. HT 356-58. Dearing's testimony about his conversation with Nicks at that time is otherwise a bit unclear but, from a review of it, I cannot find that Nicks informed Dearing of any of the appellants' whistleblowing disclosures. HT 358-66, 403. Moreover, Nicks testified that he never discussed with Dearing the recommended findings in Benson's Management Review (with which Nicks was otherwise familiar). HT 514. Nor did he ever discuss with Guevara, Cazenavette, or West the' appellants' allegations against Schaefer. HT 526-27.

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[45] OPR is a division within IN and is responsible for such matters as alleged employee misconduct investigations.

For the same reasons that I found Guevara, Cazenavette, and West credible, I find Nicks equally so. In view of all of the above, I find that Nicks, albeit he had knowledge of some of the appellants' whistleblowing disclosures, did not pass that knowledge on to Dearing or Cazenavette before the, latter determined to recommend reassignment of the appellants.

Dearing has never spoken to Schaefer and it is clear that neither has Cazenavette. HT 364. Furthermore, I find no evidence to show that Schaefer authored any documents or was otherwise able to make good on his threats that he would retaliate against the appellants even after he left NBRO. Schaefer had no access to the agency's decision makers.[46]

It is clear from the record that neither Trouville nor Cooper ever spoke to Dearing or Cazenavette about the appellants before August 29, 2002. As mentioned above, Trouville sent his August 13, 2002 memorandum to West and attached Benson's Management Review. However, as found above, Cazenavette never read it. However, it was provided by Cooper to Dearing, along with much other documentation, at Dearing's request, on August 28 or 29, 2002. *Grenier* W-l, Tab 50, Appellants' Exh. CCCC (list of documents provided by Cooper to headquarters inspectors).

Finally, here is evidence of Dearing acquiring knowledge relating to the appellant's whistleblowing

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[46] *See* text *infra* re discussion of inspectors' interviews of two individuals who were favorably disposed towards Schaefer.

disclosures. And, more importantly, Dearing admits that he read in its entirety Benson's Management Review. HT 379.

From a review of Cooper's and Dearing's testimonies, I find that the preponderance of the: evidence is that Dearing received Benson's Management Review from Cooper no later than August 29, 2002 and read it that day. HT 423. I also find, from a review of the statements in the management review,' *see supra,* that, despite Dearing's testimony that he did not recognize the statements as indicative of whistleblowing disclosures, they are clearly indicative of whistleblowing disclosures. I further find that Dearing had actual, knowledge of the appellants' whistleblowing disclosures *before* he spoke with Cazenavette on the night of August 29, 2002. Thus, I find that Cazenavette had constructive knowledge of those disclosures at the time he formulated his determination to recommend the appellant's reassignment and, in turn, Guevara also had constructive knowledge at the time he decided on the reassignments. Moreover, I find that this establishes the "knowledge" part of the knowledge/timing test in whistleblower law by- a preponderance of the evidence. *See supra; McClellan,* 53 M.S.P.R. at 147,

Although Dearing received Benson's Management Review before he spoke with Cazenavette, the record evidence shows that he had already completed his report on NBRO on "Wednesday of the previous week, i.e., August 21, 2002. HT 352, 379. That report was not changed as a result of Dearing's reading of the management

review and, clearly, his strong opinion of the problems, he saw firsthand during the NBRO inspection and reported to Cazenavette on August 29,. 2002, as identified above, has never wavered.

Dearing's observations and opinion of NBRO and of the appellants were shared by his two fellow inspectors who worked with him in NBRO on August 19-20, 2002. All three were experienced inspectors.

Kenneth Etchison explained how the NEFD headquarters inspection unfolded. At the August 14, 2002 "mount out," the inspectors received a notebook including, among other things, the operational plan for the NEFD headquarters inspection, which summarized the information, including the last division inspection,[47] that IN had gathered on NEFD and all its resident offices. The operational plan for the NEFD headquarters inspection stated that morale and cases were down in NBRO. HT 923.

When on-site in NBRO the inspectors first completed checklists of various information, e.g., employee interviews. These were maintained in a binder and then a report was written, by Dearing, about what the inspectors found in NBRO.[48] The

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[47] ASAC Carol Cooper's November 23, 2001 division inspection report was also included in the notebook. A review of it reveals no discernible whistleblowing disclosure from anyone. *Grenier* W-1, Tab 10, Subtab 4K, "Division Inspection Rep." Cooper reported difficulties in NBRO, including morale problems, but nothing extraordinary as compared to other included offices which also had various problems of their own.

[48] The findings that Dearing made in the NBRO report were almost entirely adopted in the NEFD report and contain many

NBRO report was subsequently combined with all other office reports, after review and editing, and was put into one report for the entire division. HT. 278-79; *Grenier* W-l, Tab 10, Subtab 4K (first section). "Findings" are noted in the reports. These are IN determinations that an office has violated a statute, regulation, policy, or procedure. HT 569.

Etchison testified that he, Dearing, and Auditor Gary K. Smith first arrived at NBRO at 8:30 AM on Monday, August 19, 2002. No one was there. They went for coffee and came back 20 minutes later and there still was no one there. After a few minutes a support staff person let them in. Besides the extremely poor physical facility the office occupied, the inspectors were appalled at the filthiness of the office: cords laying across walkways, trash cans overflowing, garbage/shredder bags just left in piles, food and beverages ground into the carpet, remnants on the floor, computer parts and other things just strewn about the office. HT 815-16 It appeared to them that no one cared about anything. It is obvious that the inspectors got a very bad first impression of the office and that this did not bode well for the appellants.

Etchison did the standard employee interviews of all three appellants. According to Etchison, all three appellants provided uncharacteristically brief, and sometimes untruthful, responses to the interview questions, with Shea providing the shortest answers. Shea's

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of the same points that Dearing relayed to Cazenavette on the night-of August 29, 2002.

body language was "horrible," a curt "fine" was his answer to many questions, and Etchison' generally got the impression that Shea; did not want to talk about the office situation with him." Etchison thought that Shea's attitude was "unprofessional" and wrote "total BS" as a comment in the interviewer's observations section on the Standardized Employee Interview Questionnaire. HT 288-91, 830, 838, 858; *Grenier* W-l, Tab 10, Sub tab 4K, "Core Interviews." Grenier's interview was not much better, according to Etchison. His answers were short, not the typical responses an inspector would get from a special agent with the length of service Grenier has. HT 285-87, 290-91, 8^7-28. Bock's interview was longer and more open than the other two agents but still relatively short. HT 287, 290, 832-33. Etchison got the feeling that the appellants just wanted to get through the process. HT 296.

Smith testified that Grenier gave him short and rough answers concerning information in logbooks; he certainly did not get the help he usually gets when he is dealing with DEA staff on an inspection.[49] HT 754-56. Smith testified that one day

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[49] This expected cooperation is clearly an important component of a headquarters inspection and apparently not realized by the appellants. Gilbert. Howard, RAC of the Providence, Rhode Island Resident Office, testified that his office had a lot of findings in the August 2002 headquarters inspection but the inspectors complimented his people and asked him to thank/them for their hard work, their cooperation and their willingness to help the inspectors. HT T215. Howard further testified that he told his staff before the inspectors arrived that "anything they want, you get it for them and you don't argue with them." HT 1236. Etchison commented that staff at CCTF

the whole NBRU staff just left the inspectors in the office alone; that has never happened to him in 3 years of inspecting. HT 802-03.

When the three inspectors would talk during breaks, they were commenting to each other that the office was so different from what they had experienced with the main theme being "I can't believe this is like this." HT 857. Smith added that in his opinion the office was totally broken. "Things just did not operate or weren't operating up to where it should have been, not even close to it." HT 753. For the first time, Smith testified, Dearing got "a little frustrated" with an office. HT 752, 800.

Etchison testified that he would observe the three appellants having little meetings among themselves with hushed voices and he never saw one of them speak with a task force officer. HT 860.

According to Etchison, IN expects a lot more cooperation in the interview process from special agents and they were just not getting it from the appellants. The interview gives, employees an opportunity to talk about their cases, the office, anything they want to talk about. Ironically, the inspectors are anxious to hear the kind of disclosures the appellant had been making about Schaefer for the last couple of years; their primary job is to make sure managers are doing their job. Etchison, upon laver reflection and with knowledge of the entire situation, was disturbed that the appellants did not

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was helpful. HT 863. So, to repeat, cooperativeness is obviously important and the appellants did not do themselves any favors by not exhibiting it.

bring Schaefer up as an issue. "They didn't think it was important enough to bring [issues] to my attention and wanted to live with the status quo." Etchison testified that if the appellants "had said this is the most screwed up office I've ever worked in, that Mr. Schaefer is an ax murderer, I would have written it down ... and brought it forward" as he did in two other inspections where employees essentially blew the whistle on managers during the headquarters inspection process. HT 858-59.

Dearing concurred in this sentiment. He testified that if the inspectors had been made aware of any issues regarding Schaefer they could have at least brought it to the attention of DEA management. HT 689-900. Dearing added that it would have made a difference if the appellants had told the inspectors about Schaefer, albeit they would have put the burden on the appellants to show them how that was true. HT 691.

On the other hand, two people who were cooperative and free with information for Dearing and Etchison were Arthur J. Kelly, Chief of Police, New Bedford, Massachusetts and a task force officer placed by Kelly in NBRO and whom the appellants. had alleged was corrupt.[50] These two were favorably disposed to Schaefer and not favorably disposed to the appellants. Kelly told Dearing, among other things, that if any of his people had done what the

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[50] Dearing interviewed Kelly and Etchison interviewed the task, force officer. I note that it is the firm opinion of all besides the appellants who testified on the subject that the task force officer is not corrupt, that the allegations against him are false. *See, e.g.*, HT 956 (testimony of RAC Michael J. Ferguson).

appellants had done, i.e., sided with the Massachusetts State police against DEA's interests, he would have immediately transferred them. Dearing, in fact, wrote this statement up in his summary report of NBRO. The task force officer, who was one of the subjects of the appellants' whistleblowing disclosures, also spoke up and essentially blew the whistle on the appellants. Etchison perceived the officer as straightforward and candid. HT 310. The officer told Etchison that now that Schaefer was gone, the appellants were happy because they could do what they wanted. He further opined that DEA could face liability because of the way the appellants were circumventing confidential informant policy; there could be a Whitey Bulger incident as a result.[51] HT 915-16. Etchison was glad to have this type of information because "one of my major jobs" is to make sure DEA is not exposed to criminal or civil liability. HT 310-11.

Although these were not positive reports for the inspectors to have received about the appellants, I cannot find that they unduly influenced their opinion of the appellants. It was reinforcement, yes, for the inspectors' extremely poor opinion of the appellants, but I find it clear that the inspectors would have arrived at the same opinion regardless of Kelly's and the task force officer's input. Most

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[51] This "Whitey Bulger" comment made its way into Cazenavette's September 26, 2002 memorandum. It should not have because it is a poor analogy in this case, obviously misunderstood by those who put it there. Bulger was a confidential informant whom the FBI used improperly, e.g., he was supplied information by his FBI handlers to allegedly hurt and murder people. There was no such analogous situation in NBRO.

importantly, there is no evidence to show that Dearing told Cazenavette on August 29, 2002 that. Kelly had told him (Dearing) that he would reassign the appellants if they worked for him.

Smith testified that the inspection was carried out the usual way. Dearing and Etchison did the same things they normally do. HT 758-59. Etchison did all three of the appellants' employee interviews and half the case file reviews (five) at Dearing's request. If Dearing were of a mind to control any findings in these areas, I find it unlikely that he would have allowed anyone else to perform these investigative tasks.

The appellants attempted to show that the inspectors schemed to disadvantage them in the NBRO inspection process, e.g., in the way they selected "case files to review,-in not reviewing cases for FY 2000, and in not correctly determining that the office was producing certain types off cases. However, I cannot find from my review of these matters that these experienced inspectors' deviated from standard investigative practices or were otherwise unfair in their inspection.

Dearing testified that he decided his inspection team would not review NBRO case files that were initiated in 2000 because the N-BRO was formed in May 2000 and he "basically gave them a few months, if you will, to get in, get settled, get set up rather than trying to judge what they were doing at the time they were making, the move." HT 667, 705. I find that this reasoning is entirely plausible and not unreasonable in any sense.

In addition, I find merit in the inspectors' random sampling of case files for review and find it a valid method of selection. It is statistically sound. The fact that it did not result in a more favorable selection of cases was unfortunate for the appellants but not preordained. The fact that 10 "weak" cases were selected—and I do not find credible evidence that there was a rigged selection—is indicative, I find, that the office was processing a disproportionate number of that level case," as the inspectors concluded.

And finally, I find no evidence that the inspectors purposefully deflated the number of high level-cases in the office.

In sum, I find no scheme existed to disadvantage the appellants in the NBRO inspection process also note that Michael J. Ferguson, the current RAC of NBRO, testified that since arriving in NBRO in November 2002, he has addressed the headquarters inspection, reviewing each and every finding. He has found that the findings were "all very accurate." HT 941-44.

In view of all of the above, I find that the agency has clearly shown that neither Cazenavette, Dearing, nor anyone else brought to bear on Guevara's decision to reassign .the appellants any undue influence based on reprisal for whistleblowing.

The existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision

With respect to the existence and strength of any motive to retaliate on the part of Cazenavette and Guevara, I find none. The appellants certainly did not present any evidence to show improper motive on the part of either official. The appellants' whistleblowing disclosures had nothing whatsoever to do with these two officials. Instead, the disclosures targeted an individual, i.e., Schaefer, whom everyone appeared to agree was a liability to the agency and someone they were just as happy to see retired. Moreover, as alluded to above, Cazenavette and his inspectors would have welcomed whistleblowing disclosures about Schaefer during the course of the NBRO headquarters inspection. Schaefer personified bad management, a condition Cazenavette had dedicated his last months of government service to-eliminate.[52]

I also note that Cazenavette, as a member of the agency's Career Board, cast the deciding vote in a 5-4 split on the question of whether Bock's request for a medical extension of his reporting date from January 2003 to August 2003 should be granted. I find that Cazenavette's action in this instance is not that of an official with a motive to retaliate. Also, I note that Guevara granted two (Grenier's and Shears) of the three appellants' requested extensions' on their reassignments for 45 days,

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[52] According to Cazenavette, part of IN's job and his reason for accepting the Chief Inspector position was' to correct bad management. He wanted to see the inspection process be able to identify performance and lack of performance. It seemed there had been no consequences for lack of performance; he wanted to hold people accountable. HT 986-87.

which he is authorized to do.[53] I find that Guevara's granting the two extensions he could, even though they were for short periods, is not the action of an official who has a motive to retaliate.

Neither Cazenavette nor Guevara viewed the reassignment actions as punitive. Rather, Cazenavette believed that each of the appellants had the ability to be outstanding performers; otherwise, DEA would not have hired them. And the whole point "was to get them to that level where we thought they could perform." HT 1039, He wanted to see them rehabilitated and to learn from the experience; when DEA hires agents it believes they are "the best of the best" and the agency has "a lot of money" invested in them. He intended to give the appellants an opportunity to prove themselves in a new environment. HT 980-81.

Guevara had the same idea. He testified that he saw the reassignments as an opportunity for the appellants because obviously they had become complacent in NBRO, "but the slate is clear once they get there, and they're senior agents; in two or three years from now, they could be the supervisors;" this was "an opportunity not only for the agency but

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[53] The third (Bock's), being for a much longer period, had to go to the Career Board.

for the agents to be able to go to a new office and start anew."[54] HT 62-63, 1062.

In sum, I find no motive to retaliate on the part of Guevara or Cazenavette.

Any evidence that the agency takes similar actions against agency employees who are not whistleblowers but who are otherwise similarly situated

The appellants alleged that the fourth agent in NBRO, Daniel J. Forde, was not a whistleblower aid was similarly situated to them, yet he was not reassigned. First, it is clear from the record that Forde was not reassigned. However, it is not clear from the record that Forde could not at least be perceived as a whistleblower. In Benson's Management Review, for instance, he is listed as one of the NBRO interviewees and then the narrative immediately following states: "the perception of those interviewed was that the RAC is the cause of this office having such a high turnover of TFOs (i.e., task force officers);" also, "due to bad relations with other agencies throughout the region, the NBRO received very little cooperation and few referrals." It continues along the same lines as many of the appellants' alleged disclosures. But no one is differentiated as the source of any of these

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[54] Michael J. Ferguson, the present RAC of NBRO and the appellants' supervisor, put it well when he stated his belief that "DEA is a very forgiving agency;" there are "bumps in the road" of everyone's career, but one "can come to a new place with a clean slate and have a chance to start fresh." HT 974-75.

allegations. Thus, from reading only Benson's Management Review, one would not know that Forde was any less a whistleblower than any of the three appellants. That said, I will assume that Forde is not a whistleblower and only decide the similarly situated issue.

With respect to that issue, Dearing did Forde's employee interview on the second week of the headquarters inspection. Forde, who was on military leave the first week of the inspection while the inspectors were in NBRO, came up to NEFD in Boston the second week. Dearing testified that Forde was "bright, energetic, helpful." HT 684. According to Cazenavette, Dearing told him (Cazenavette) on August 29, 2002 that Forde was working. Cazenavette got the impression that Forde-was "out swinging and trying to hit the ball," albeit the investigation level of the cases he was working was not "what we wanted to see." He was working with the task force officers which is fine, according to Cazenavette, as long as he was not aligned with them so as to lose his DEA identity. HT 136-39, 1036-37. Again, Cazenavette was relying on Dealing's expert judgment in arriving at his conclusions about Forde.

In view of the above, I find that Forde was not similarly situated to the appellants. The appellants were reassigned essentially for three reasons: their poor performance, their poor attitude and demeanor exhibited to the inspectors, and their lack of candor in responding to direct questions. Forde was not guilty of any of these although on performance, it would be difficult to distinguish him.

Unfortunately for the appellants, it appears that the inspectors lumped together all that was happening in NBRO—and they were finding overwhelmingly bad things—and blamed the DEA employees who were there, i.e., the appellants, for them. One of the reasons that Schaefer was not focused on is that he was not there. The same is true for Forde. Fortunately for him, he was away on military leave the week the inspectors were in NBRO.[55] He thus was not associated with the shortcomings that the inspectors were finding minute by minute.

I also note that the appellants' case is the first time Cazenavette made a recommendation to Guevara to reassign anyone. However, the record evidence shows that Cazenavette recommended the reassignment of a RAC and three ASACs, ostensibly not whistleblowers, from the Detroit Field Division before Guevara began as Chief of Operations in June 2002. According to Cazenavette, each of them had numerous elements that they had not identified during their own self-inspection and they were not doing their jobs.[56] HT 146, 987. Two of the ASACs were eventually reassigned. HT 989. Thus, there is

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[55] Smith testified that Forde was not there to form an opinion about. HT 798-99. Etchison added that there was not a lot of discussion about Forde "because he just wasn't there" HT 926

[56] There is also some evidence that, after September 26, 2002, Cazenavette and Guevara have both been involved in the reassignment of others for similar, e.g., performance, reasons. But, because these actions occurred after these officials knew of the appellants' whistleblowing complaints, I find them to be of limited probative value.

some evidence that Cazenavette was not singling out the appellants.[57]

In view of all of the above, I find that the agency has proven by clear, and convincing evidence that it would have taken the reassignment actions in the absence of the appellants' whistleblowing. The agency evidence in support of its' action is strong, the two agency officials most involved in effecting the reassignment actions barely knew that the appellants were whistleblowers and were not themselves, "the subject of any disclosures, and the agency has taken similar reassignment actions against employees who are not whistleblowers but who are similarly situated (in the sense that they were viewed as not doing their jobs) and has not taken similar action against a non-whistleblower employee for good reason, i.e., he was not similarly situated.

DECISION

The appellant's request for corrective action is DENIED. Based on this denial, and in accord with my previous rulings on the stay requests, the stay orders in the appellants' cases have now expired.

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[57] There is also some evidence that, after September 26,2002, Cazenavette and Guevara have both been involved in the reassignment of other for similar, e.g., performance, reasons. But, because these actions occurred after these officials knew of the appellants' wistleblowing complaints, I find them to be of limited probative value.

FOR THE BOARD:

/s/
William Carroll
Chief Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANTS

This initial decision will become final on October 24, 2003, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your, petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

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September 19, 2003

/s
Joyce Reynolds
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON FIELD OFFICE

CHRISTOPHER W. GRENIER,
PAUL C. BOCK, AND
TODD M, SHEA
Appellants,

v.

DEPARTMENT OF JUSTICE,
Agency.

[ENTERED April 14, 2003]

DOCKET NUMBERS
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DATE: April 14, 2003

ORDER

On February 24-25, 2003 I held a bifurcated hearing in the above-captioned appeal in order to determine whether the appellants met their burden of proof to show that their purported whistleblowing disclosures were a contributing factor in the agency's reassignment of each of them from New Bedford, Massachusetts to three locations on the Southwest border. As I had explained in my February 10, 2003 order summarizing the ruling I made at that day's

prehearing conference, a bifurcated hearing was-the most efficient way to proceed in light of the agency's viable allegation that responsible agency officials had no actual or constructive knowledge of the appellants' disclosures.

From my review of all the evidence, including particularly the testimonies of the witnesses presented at the February 24-25, 2003 hearing, I find that the appellants have met their burden of proof. In short, I find the facts, by a preponderance of the evidence, to be *at least* the following; Senior Inspector Richard Dearing had actual knowledge of the appellants' purported whistleblowing disclosures because he read, *before speaking with Chief Inspector George J. Cazenavette III on Thursday night, August 29, 2002,* the "Management Review of the New Bedford Resident Office and the Cape Cod Task Force (FFS 140-01)" in which the disclosures were identified (Dearing's understanding of those disclosures to be whistleblowing disclosures is immaterial); Cazenavette thus had constructive knowledge of the disclosures before he formulated his intent on August 20, 2002 to recommend to Chief of Operations Rogelio Guevara, on September 26, 2002., that the appellants be reassigned; in turn Guevara had constructive knowledge of the appellants' disclosures when he ordered the reassignments on September 26, 2002.

In addition, I find, in applying the above-decided facts to the law, e.g., Board precedent, that this line of knowledge leading to the ultimate decision to reassign (i.e., Dearing's actual knowledge, Cazenavette's constructive knowledge,

and Guevara's constructive knowledge) is sufficient to establish the "knowledge" part of the knowledge/timing test in whistleblower case law. *See McChllan* v. *Department of Defense,* 53 M.S.P.R. 139, 147 (1992) (reprisal can be shown by establishing that a person with only constructive knowledge of the appellant's disclosure can influence the official taking the action against the appellant). I otherwise find with respect to the timing part of the knowledge/timing test that the disclosures were made within such time that a reasonable person could find that they contributed to the actions. In sum, the appellants have proven their disclosures were a contributing factor in their respective reassignments.

I emphasize the obvious. The above findings are made in. summary fashion. If this were an initial decision, my ruling on the knowledge/timing test would comprise at least 10 pages of very detailed factual and legal analysis and findings. However, there is no need for such detail here because, in essence, we are still in the midst of case processing. Moreover, the parties are hereby notified that I will not revisit this ruling before I issue my initial decision in this consolidated case. Thus, I will accept no request for reconsideration or similar motion with respect to this ruling. Indeed, I will summarily reject and return any such request/motion to the party filing it. In sum, this part of the case is behind us. We are moving on.

The only parts of the case that remain in contention are whether the appellants did indeed make disclosures protected under 5 U.S.C. §

2302(b)(8), i.e., whistleblowing disclosures, and whether the agency can establish by clear and convincing evidence that it would have taken the reassignment actions in the absence of the disclosures.

With respect to the making of whistleblowing disclosures, it has appeared to me throughout and it is still my firm impression that each of the appellants will easily be able to establish that he indeed made such disclosures. However, I am cognizant that the agency has contested each appellant's ability to establish this part of their respective appeals. If I allow evidence to be introduced at hearing on this issue, the hearing will likely require many days of testimony even if I otherwise restrict the proof to just several purported whistleblowing disclosures from each appellant. In an attempt to avoid this inefficiency, I am hereby requiring the agency' to review each of the 147 instances of purported whistleblowing disclosures identified by the appellants' representative in. his February 7, 2003 prehearing submission and state which of these the agency is alleging does not constitute a whistleblowing disclosure and why it does not. (The agency representative should be aware that each appellant need only prove that he made one whistleblowing disclosure to meet his burden on disclosures).

The agency representative will present her allegations in her supplemental prehearing submission to be filed by May 9, 2003. *See infra.* At the May 16, 2003 supplemental prehearing conference, *sec infra,* I will rule on whether the

agency has presented good reason for the hearing to proceed with evidentiary presentations on the issue of the making of disclosures or whether the hearing will proceed with just the submission of written or oral argument on that issue.

Of course, the pivotal issue in this case is whether there is clear and convincing evidence that the reassignment actions would have been taken in the absence of the appellants' disclosures. In this regard, I will be looking primarily at the strength of die agency's reasons for the reassignment actions, the existence and strength of any motive agency officials had to retaliate against the appellants, and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are similarly situated. Evidence will be liberally allowed on these matters with the primary witnesses being Guevara and Cazenavette. However, the parties should be mindful that some evidence on these matters was already introduced in the February 24-25, 2003 hearing via the testimonies of these two officials, albeit I recognize that I restricted each of their testimonies on the grounds of relevance because of the particular nature of that hearing. The parties should review the testimonies of these witnesses in an attempt to limit unnecessarily repetitive testimony in the supplemental hearing. *Sea infra.*

The parties may amend their previously filed prehearing submissions. They must file such amendments no later than May 9, 2003. There is no need to repeat anything in those previous submissions. The representatives should be only

adding to or subtracting from them. (Please be aware that I will be attending the Board's Legal Conference from May 5-9, 2003 and will thus be unable to respond to any last-minute motions, etc.)

The supplemental prehearing conference will be held at 10 AM, May 16, 2003. I have not set a date for hearing but will leave it to the parties to select a mutually available date (please be cognizant of witnesses' availability) on any of the following consecutive dates: June 3-6, June 16-20, June 30-July 3, July 7-11, 2003.

Finally, the parties are encouraged to once again attempt settlement of their dispute. The time, energy and expense of this case to both sides is mounting, and quickly. A resolution at this time could well be in both parties' interests. Failed attempts in the past should not deter the parties from exploring solutions which may be more palatable at the present time. In this regard, let me repeat the offer of appointing as a settlement judge in this matter our regional director, William Boulden. Judge Boulden officiated in many whistleblowing cases when he was an administrative judge in the Board's Washington Regional Office. He could provide the parties a fresh perspective and explore alternatives neither the parties nor I have thought of to date. The parties should notify me as soon as possible if this is an approach they would like to take and I will make the arrangements.

FOR THE BOARD

/s/
William Carroll
Chief Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON FIELD OFFICE

CHRISTOPHER W. GRENIER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

[ENTERED December 31, 2002]

DOCKET NUMBER
BN-1221-03-0033-S-2

DATE: December 31, 2002

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Imelda L. Paredes, Esquire, Alexandria, Virginia, for the agency.

BEFORE

William Carroll
Chief Administrative Judge

ORDER GRANTING STAY REQUEST

By motion filed December 17, 2002, the appellant, a Special Agent, GS-1811-13, with the Drug Enforcement Administration (DEA), New

England (i.e., Boston) Division, New Bedford (Massachusetts) Resident Office (NBRO), moved for the second time[1] for a stay of his pending reassignment to be effective January 12, 2003 to the Imperial County Resident Office, San Diego (California) Division, DEA. For the reasons set forth below, the appellant's motion is GRANTED.

The appellant meets the Board's filing requirements for a stay request per 5 C.F.R. § 1209.8. He filed his motion by FAX after having become eligible to file an appeal with the Board[2] and before the close of discovery in his pending individual-right-of-action (IRA) appeal, *see Grenter v. Department of Justice,* MSPB Dkt. No, BN-1221-03-0033-W-1, and he correctly served his motion on the appropriate Board field office (i.e., Boston Field Office). He also simultaneously filed his motion *inter alia*, upon the agency's designated representative, showing by an accompanying certificate of service how and when service was made (i.e., by FAX and overnight mail on December 17, 2002). Moreover, I find that the appellant meets the content requirements of 5 C.F.R. § 1209.9(a) for his stay request.

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[1] The appellant's first stay request was denied on November 25, 2002. *See Grenier v. Department of Justice*, MSPB Dkt. No. BN-1221-03-0033-S-1

[2] The appellant first sought corrective action from the Office of Special Counsel and received a written notification from that agency on November 5, 2002 that it was terminating its investigation of the appellant's allegations. See 5 C.F.R. § 1209.5.

The agency filed its response to the stay request within the regulatory 5 days, *see 5* C.F.R. § 1209.9(c), on December 24, 2002. The appellant replied to the agency response on December 30, 2002 claiming the response contained crucial evidence, i.e., .an August 13 2002 report entitled "Management Review of the Cape Cod and New Bedford Offices," which the appellant had heretofore not been privy Under the circumstances, I find no obstacle to the appellant's filing regulations are silent with respect such filing of his reply, noting that the Board's regulations are silent with respect to such filing.

This ruling on the instant stay request is made within the mandatory 10 workdays after receipt of the request, i.e., December 17, 2002. *See 5* C.F.R. § 1209.10. The ruling addresses, as the regulation mandates, whether there is a substantial likelihood that the appellant will prevail on the merits of his IRA appeal.

The initial determination to be made is whether the appellant has established Board jurisdiction over his whistleblower claim by showing that he has exhausted his Office of Special Counsel (OSC) remedies and by making non-frivolous allegations' that he nude disclosures protected under 5 U.S.C. § 2302(b)(8) and the disclosures were a contributing factor in the agency's decision to take a personal action as defined in 5 U.S.C. § 2302(a). *Rusin* v. *Department of the Treasury,* 92 M.S.P.R. 289, 304 (2002).

As indicated in footnote 2 *supra,* the appellant has shown that he raised the whistleblower issue before the OSC and proceedings before OSC have been exhausted. Moreover, I find it clear that the agency took a personnel action by proposing to reassign the appellant.[3] From a review of the appellant's exhaustive rendition of all the facts and circumstances in his case, including his experience as a special agent and the disclosures he made regarding his former immediate-supervisor, Resident Agent in Charge (RAC) John Schaefer, I. find he had a reasonable belief that many of his numerous disclosures evidenced an abuse of authority, gross mismanagement, a violation of law, rule, or regulation, and/or a substantial danger to the public health or safety.

In my order denying the appellant's, first stay request, I found that the agency official primarily responsible for proposing the appellant's reassignment was New England Division Special Agent in Charge (SAC) Mark Trouville. However, the appellant, based on "newly discovered evidence contained within the Agency file,"[4] asserts that .the official primarily responsible for the reassignment was the agency's chief inspector, George J. Cazenavette, III. There is good reason for this assertion. In his September 26, .2002 memorandum entitled "Recommendation for Transfers: Special Agents Chris Grenier, Todd Shea, and Paul Bock,

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[3] In view of the Fact that the appellant has yet to actually be reassigned, and such action will not happen until an effective date comes and goes, it is still only a proposed action.

[4] I.e., the agency's response file in his IRA appeal

New Bedford Resident office, Boston Division," Cazenavette stated his recommendation was based on these agents' alleged poor performance exposed during an on-site inspection conducted by his office, i.e., the Office of Inspections, on August 19-20, 2002, as well as on a interview with SAC Trouville in which he (Trouville) stated that these agents "failed to support DEA and its mission, and in fact actively supported the position of the Massachusetts State Police against DEA's interests." *See* Stay Request File (SRF), Tab 1, Appellant's Ex. A. The appellant asserts that his active, support of certain Massachusetts State Police officer's disclosures of gross mismanagement, abase of authority, etc., made against his immediate, supervisor, RAC Schaefer, constituted his whistleblowing—dubbed by the agency a failure to support DEA--and is now the overriding reason he is scheduled to be reassigned.

The agency claims that there is no evidence that Cazenavette was aware of any protected disclosures made by the appellant. I find this claim without merit. Cazenavette indicated in his September 26, 2002 memorandum that he concurred "with the management review conducted by the Boston Division." This review was conducted at Trouville's direction[5] and he sent it: to DEA headquarters officials on August 13, 2002. *See* SRF, Tab 2, Agency Ex. 1, pp, 1-2. Close perusal of the review. *see* SRF, Tab 2, Agency Ex. 1.pp. 3-15, reveals several instances where the inspectors reported on the unmistakable whistleblowing

[5] The review was actually conducted on March 19-21, 2002, but the lengthy report of it, undated in the record, was probably not forwarded to Trouville until much later.

activities of several agents, including the appellant.[6] Furthermore, the first listed recommendation made by the reviewers, and endorsed by Trouville, was: "[systematic, across the board transfers/removal of all assigned personnel (NBRO) appears to be the only viable solution to what appears to be a long term, ongoing, institutionalized issue fueled by preconceived notions and prejudices towards the RAC." *Id:* at p. 15. In sum, I find that in reading the Boston Division's review, Cazenavette had to have seen the obvious references to the appellant's whistleblowing disclosures. I thus further find that Cazenavette had actual knowledge of those disclosures. Moreover, I find that he recommended the appellant's reassignment within a short time after learning of those disclosures which recommendation was based in part, as he saw it, on the appellant's "failure to support DEA," i.e., making disclosures against RAC Schaefer.[7]

In view of all of the above, I find that the appellant has established jurisdiction over his whistleblowing claim and that he has further shown a substantial likelihood that his whistleblowing disclosures were a contributing factor in his proposed reassignment action.

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[6] Many of these are documented in the appellant's December 30, 2002 reply. *Sue* SRF, Tab 3.

[7] It is unclear from this record but, evidently, someone in upper DBA management has the authority to actually effect, i.e., authorize, the appellant's reassignment. The parties did not address this point so I must assume that once Cazenavette made his recommendation, the appellant's reassignment was a forgone conclusion.

Under 5 U.S.C.§ 1221(e)(2), the Board may not order corrective action "if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure," In making this determination, the Board generally considers, *inter alia,* the strength of the agency's evidence in, support of its personnel action and the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision. *See Visconli v. Environmental Protection Agency,* 78 M.S.P.R. 17, 24 (1998).

In the first stay request order, I found that the motive to retaliate was weak because agency management welcomed the appellant's whistleblowing activity, that it realized that RAC Schaefer was a poor manager, that the particular managers responsible for his reassignment were not the targets of the whistleblowing disclosures, that management had evidence of the appellant's performance problems from the headquarters inspection, and that management was just tired of the underlying miserable state of affairs in NBRO and wanted a quick fix. *See Greni.er v. Department of Justice,* MSPB Dkt, No. BN-1221-03-**0033-5-1** (Nov. 25, 2002)

However, recent revelation of the Boston Division's internal management review and the Office, of Inspections on-site inspection of the NB.R.O, referenced *supra,* casts a different light on the motivation issue. My review of the reports of (the review and the inspection reveals a management preoccupation/obsession with reassigning the.

appellant and two other similarly situated agents who were responsible for an alleged failure to support DEA and its mission. It also reveals a lack of perception and/or appreciation by management that any failure to support was founded on the fact that those agents, including the appellant, rightfully blew the whistle on RAC Schaefer, a manager whom Trouville and Cazenavette readily recognized as a total incompetent but one who somehow also deserved loyalty and blind obedience from his subordinates.

I also note in this regard that the on-site inspection recommended "systematic, across the board transfers/removals of all assigned personnel," *see supra,* yet Special Agent Daniel Forde, the fourth agent in the NBRO[8] and the only non-whistleblower, is not being reassigned. The agency has to realize how bad the appearance is of reassigning only the three whistleblowers while leaving the non-whistleblower in place.

With respect to the alleged poor performance of the appellant, I find that the agency has not sufficiently clarified how many performance errors he has committed over what time period, how serious any of these errors really are, how many of them were really caused by Schaefer to the appellant's detriment, and/or how much remedial instruction/retraining any of them will require to correct his performance. On top of this is the issue of the efficacy of reassigning an allegedly

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[8] At least it appears that Forde was a fourth agent in NBRO. The record is not clear exactly when or for how long he was an NBRO agent

incompetent employee to a geographical area which seemingly would require a reasonably good performer. Also of note are the appellant's (unrebutted) points that none of his alleged performance problems have ever been brought to his attention or attempts made to correct them despite 4 months having elapsed since their alleged discovery.[9] In short, I find that the strength of the agency's evidence to support the appellant's poor performance is weak.

Accordingly, I find that the balance has shifted and that the agency's professed need to reassign the appellant based on his poor performance and on a need to correct the underlying miserable state of affairs in NBRO is now not sufficient enough to outweigh the agency's retaliatory motive. I thus find that at this time the agency has not shown that it will be able to sufficiently prove by clear and convincing evidence that it would have taken the reassignment action in the absence of the appellant's disclosures. Consequently, I find a substantial likelihood the appellant will prevail on the merits of his IRA appeal.

The agency argues that a grant of a stay would result in extreme hardship to it, disrupting the lives of other special agents and adversely affecting its mission at NBRO and the Imperial

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[9] I find, in accord with my November 25, 2002 first stay request order, that the appellant's reliance on his previous excellent performance appraisals is misplaced given that they were authored at the immediate supervisor level by the incompetent Schaefer.

County office. According to the agency, the appellant's continued presence will only regress the DEA presence and stature in the NBRO area. Also, there is a shortage of an agent in Imperial County. The agency's position is supported by the sworn statement of Rogelio E. Guevara, Chief of Operations, DEA. *See* SRF, Tab 2, Agency Ex, 4

I note that the agency has already approved, through its Career Board, an extension of the reporting date of one of three reassigned NBRO agents up until August 17, 2003. *See Bock v. Department of Justice,* MSPB Dkt. No. BN-1221-03-0034-S-2 (Dec. 30, 2002). So, there is room for providing for employee hardships.

Also, the "regression of DEA presence" that the appellant allegedly would cause-is, I find, entirely speculative. With Schaefer gone, relationships between federal/state/local law enforcement agencies are bound to improve all around. Schaefer was the problem, not the appellant. The agency has not sufficiently explained why the appellant's presence should cause any "regression"

The assignment on TDY (temporary duty assignment) of special agents should alleviate any shortages the agency may suffer in a particular office during the short time before I issue my initial decision in the appellant's IRA appeal. Certainly, this will cause the agency to expend some additional funds, but the amounts pale in comparison to the amount it would spend in reassigning the appellant

and his two fellow whistleblowers—allegedly (and unrebutted) $350,000, one way.[10]

In view-of all of the above, I find that the agency has not supported a claim of extreme hardship.

Based on my analysis above, I hereby GRANT the appellant's second stay request. The agency is ORDERED not to reassign the appellant. The appellant requested that the stay be in place until I issue my initial decision in the appellant's IRA appeal. I find such time limit, reasonable and I so order no reassignment action until such issuance."[11]

FOR THE BOARD:

/s/
William Carroll
Chief Administrative Judge

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[10] This, of course, would double to $700,000 if the three whistleblowers were first reassigned and then un-reassigned by Board order and moved back to NBRO.

[11] I expect to hold a hearing in early February 2003 and issue my initial decision in March or April 2003. At that time I will either order corrective action or not. If corrective action is ordered, it will perpetuate the no-reassignment date. If corrective action is not ordered, the agency will be free to reassign the appellant.

CERTIFICATE OF SERVICE

I certify that the attached Document (s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Christopher W. Grenier
25 Apple Tree Lane
Harrington, RI 02 8 06

Appellant's Representative's, by FAX
Peter H. Noone, Esq.
AVERY DOOLEY POST & AVERY, LLP
Attorneys at Law
90 Concord Avenue
Belmont, MA 02478

Agency's Representative(s), by FAX
Imelda L. Paredes, Esq.
U.S. Department of Justice
DEA Headquarters
Office of Chief- Counsel (CCA)
2401 Jefferson Davis Highway
Alexandria, VA 22301

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

DECEMBER 31, 2002
Date

/S/
JOYCE REYNOLDS
PARALEGAL SPECALIST

Memorandum

Subject
Boston Field Division On-Site Inspection
(FFS: 170-02)

Date
OCT 29 2002

To: Asa Hutchinson
Administrator

From /s/
George J. Cazenavette, III
Chief Inspector

I have approved the Office of Inspections (IN) report concerning the inspection of the Boston Field Division. The report and your letter of transmittal to SAC Trouville are attached hereto.

Two issues cause me special concern. The first is the unacceptable situation extant at the New Bedford Resident Office (RO). IN recommended, and I approved the issuance of 11 Findings. Among the Findings were serious deficiencies in the program areas of Enforcement Effectiveness, Evidence Handling, Confidential Source(CS) Management, Imprest Fund Management, Seized Assets, Accountable Property, Fiscal Operations, Security, and Space and Utilities

Three Special Agents (SA) assigned to the RO, SAs Christopher Grenier, Todd Shea, and Paul Bock were determined by Inspectors to have failed to properly execute their assigned duties. IN reviewed

the collateral duty list for the office and found SA Grenier was responsible for seized and recovered monies, imprest fund, and office safety. SA Shea was responsible for drug evidence, accountable property, and office security. SA Bock was responsible for nondrug evidence. IN determined the neglect of duty by SAs Grenier, Shea, and Bock in respect to these critical program areas led to the deficiencies encountered by IN.

SAs Grenier, Shea and Bock contributed to, or were the basis for, the deplorable office conditions, the general lack of cleanliness, and lack of security at the New Bedford RO. The actions, or lack thereof, by SAs Grenier, Shea, and Bock were significant contributing factors to the issuance of the Evidence Handling, Enforcement Effectiveness, CS Management, Space and Utilities, Security, and Security Sweep Findings. Each of these Findings are directly attributable to SAs Grenier, Shea, and Bock. Inspectors observed general lack of respect for DEA procedures and property and near complete indifference toward the DEA mission on the part of SAs Grenier, Shea, and Bock.

Through a random review of investigative files, IN identified a serious lack of effectiveness in the New Bedford RO enforcement operation. IN determined that approximately 50 percent of the cases were in the Summary Report format and merely claimed arrests and seizures. These investigative files did not contain any documentation of DEA presence, participation, and/or follow-up investigation. These investigations were opened upon information being supplied from the police

departments that participate in the New in the New Bedford RO task force. The office had not conducted a Title III investigations during the last three fiscal years and did not initiated an OCDETF investigation in the past year and a half. The office had only four active CSs (approximately .36 CSs per law enforcement officer); approximately half the national average. The enforcement effectiveness review also revealed that SAs Shea and Bock had not established a CS in the past year.

During the review of the drug evidence program, SA Shea, in an effort to explain his inability to produce the required logbooks, told the Inspectors that the New Bedford RO only seized drugs during normal office hours. IN's investigative file review found several instances where drug evidence had been stored in the office overnight.

A Management Review of the situation in the New Bedford RO was conducted earlier in the year at the direction of SAC Trouville. Part of that review centered on the relationship between the New Bedford RO and the Massachusetts State Police. During SAC Trouville's management interview with IN, he stated that SAs Grenier, Shea, and Bock failed to support DEA and its mission, and in fact actively supported the position of the Massachusetts State Police against DEA's interest. IN's interview of a Task Force Officer raised concerns that SAs Grenier, Shea, and Bock were routinely ignoring established policies and procedures, thus exposing DEA to unnecessary liability. The TFO stated that the total disregard of DEA's CS policy by Grenier, Shea, and Bock would lead to a "Whitey Bulger

incident" (a reference to a widely publicized scandal involving the improper handling of organized crime informants by FBI agents).

Based upon the results of the on-site inspection, and in concurrence with the management review conducted by the Boston Division, I recommended to the Chief of Operations and to the Deputy Administrator that SAs Grenier, Shea, and Bock be reassigned to other divisions to promote the efficiency of the service. Clearly, an immediate effort was required provide an environment conducive to an effective DEA presence in the New Bedford Resident Office's area of responsibility. Continued strong support of SAC Trouville's efforts will be required to produce the desired result:

The second issue concerns the deficiencies in the 2001 division inspection conducted by ASACs Carol Cooper and John Mahoney. The Division Inspection Program (DIP) report indicates that the named ASACs inspected the mandatory programs within their areas of responsibility. The report also states that certain programs were reviewed and no deficiencies were noted or that deficiencies were identified and presumably addressed. The IN on-site inspection identified numerous deficiencies in the areas of evidence handling, investigative file management and management effectiveness within the reporting elements supervised by ASAC Cooper and ASAC Mahoney.

The day to day responsibility for management of any DEA division lies with the Assistant Special Agents in Charge. In this case, the performance of

ASAC Cooper and ASAC Mahoney is less than acceptable. I have recommend that SAC Trouville consider proposing formal discipline.

A copy of the memoranda to SAC Trouville expressing my views in this regard is attached for your information.

Attachment

MEMORANDUM

Subject
Management Review of the New Bedford Resident Office and Cape Cod Task Force (FFS 140-01)

Date

To:
Mark R. Trouville
Special Agent in Charge
New England Division

From
Rodney G. Benson
Assistant Special Agent in Charge
New England Field Division

Introduction:

Pursuant to your directive, from march 19 through March 21, 2002, myself along with RAC John Dudley (Springfield RO), GS Dave Golia (OCDETF Coordinator), and GS Leo Ducey (Manchester RO) (Management Review Team-MRT) conducted an internal management review of the DEA Cape Cod Task Force (CCTF) and the New Bedford Resident Office (NBRO). The purpose of the review was to assess current office operations and management as well as operational effectiveness. In addition to the management review, I investigated Allegations as Conduct Unbecoming concerning NBRO RAC John Schaeffer. This part of the review

was conducted by myself and GS Ducey and is detailed in a separate report.

The CCTF became a DEA funded office in 1987. Prior to that time, the office was primarily founded by and managed by the Massachusetts State Police (MSP). The MSP troopers, specifically John Allen and Robert Melia, were the original founders and leaders of the task force. They remained in the CCTF despite being promoted to Detective Lieutenant and Lieutenant (Lt.), respectively. The consensus of CCTF personnel revealed that the MSP and specifically the Lts. were highly thought of and in some cases, idolized. In September of 1999, John Schaefer reported to the CCTF as the RAC from the Vienna County Office. Shortly thereafter, CCTF personnel indicated that a power struggle ensued between RAC Schaefer and the two Lts. This tension and friction continued to mount and in November of 2001 the CCTF was dissolved and all Task Force Officers were removed from the group. The bitterness and hate towards DEA and specifically RAC Schaefer concerning the demise of the CCTF is prevalent and addressed in this review. It should be noted, that the NBRO was opened by RAC Schaefer in May 2000 and the RAC physically sat at that location and had managerial oversight for both offices until January 2002. At this time, RAC Schaefer has managerial oversight for only the NBRO.

Synopsis:

The management review consisted of interviewing all personnel currently assigned to the

CCTF and the NBRO as well as conducting a Self-Inspection of several program areas. It should be noted that NEFD ASAC Carol Cooper conducted a Self-Inspection of the CCTF in the latter part of 2001. ASAC Cooper's Self-Inspection revealed a long-standing situation where DEA enforcement requirements were being circumvented as a matter of convenience by Task Force Officers and Special Agents alike with the focus of efforts being on low-level targets. ASAC Coopers report described a hybrid system of enforcement and case management, i.e. combining Massachusetts State Police methods and evidence handling procedures with those of DEA. This caused confusion in tracking operational issues through investigative files. A similar sysemt was used with the employment of Confidential Sources.

The MRT's Self-Inspection focus was to determine whether corrections had been implemented since the Self-Inspection by ASAC Cooper and determine overall adherence to DEA policies and procedures. This involved the review of case files, confidential source files, evidence handling and related issues. In regards to the Self-Inspection review, the MRT discovered deficiencies both at the CCTF and the NBRO concerning case files, confidential source files, and evidence handling. All deficiencies were brought to the attention of RAC Schaefer and GS Ferguson for corrective action and are detailed further later in this report. It should be noted that the MRT did note corrective action by GS Ferguson and RAC Schaefer relative to action items uncovered during ASAC Coopers Self-Inspection.

The interview of CCTF and NBRO personnel were designed to evaluate the current state of affairs, the morale of assigned staff and the quality of overall management relative to the NBRO and the CCTF. At the conclusion of the subject interviews, the combined assessment of ASAC Benson and GS Ducey was that these offices, given the current circumstances in their totality have, at best, been ineffective. The recent arrival of GS Ferguson at the CCTF should resolve some, if not all, of the issues there. However, several problems remain in effect especially at the NBRO and are detailed later in this report.

I. Cape Cod Task Force (Interview of Personnel):

On March 19, 2002, myself and GS Ducey interviewed all staff present, assigned to the CCTF. SA Daniel Hutchinson was away on temporary assignment and was subsequently interviewed on March 28, 2002. The following personnel were interviewed:

Michael Ferguson, GS
Diane Thompson, Office Assistant
Thomas Millar, SA
Daniel Hutchinson, SA
Sean Balcom, Task Force Officer (TFO) – Detective, Barnstable PD
Paul Cara, TFO – Detective, Plymouth PD

As mentioned above, the CCTF became a DEA funded office in approximately 1987. Prior to this, the office was primarily founded by and managed by

the Massachusetts State Police (MSP). Among those MSP Troopers involved, John Allen and Robert Melia, were the original founders and leaders of the tas force. Subsequently, upon the arrival of RAC Schaefer in September of 1999, a power struggle ensued between RAC Schaefer and the two Lts. Ultimately, the MSP were removed fromt eh CCTF over poor relations (previously documented in other memos by ASAC Carol Cooper).

In summary, the interviewees thought the RAC was "strange", had a bar temper and made disparaging remarks about both the SAs and TFO's. The RAC was often heard to say, "The Cape will be my legacy; good or bad." (no further explanation). Each of those interviewed (from both the CCTF and the NBRO) related a story in which RAC Schaefer called Lt. Allen outside to fight after a long argument. While all agreed there was no fight, no one admitted to witnessing the incident. This became a common theme throughout the interviews: many of the problems have grown in scope as a result of rumor and hearsay.

In general it was revealed that RAC Schaefer made "life long enemies" with the MSP, and other undisclosed local departments, for DEA. In fact, more than one person stated that it was embarrassing the way DEA treated MSP (removing the MSP from the CCTF) – during one interview the interviewee was moved to tears when disclosing this issue. Also, several CCTF SA's and TFO's indicated that when they would request assistance from the NBRO, agents and task force officers assigned to the NBRO would have to sneak out to assist the CCTF

with cases in New Bedford because the RAC would not allow them to help. It is believed that the RAC did not want to see the MSP Lts. Succeed.

Also, several interviewees described an incident in January 2001 when RAC Schaefer was called to Boston to meet with ASAC Cooper and rumors circulated that the RAC was to be removed from the office. After the meeting in Boston, several of the interviewees heard the RAC was enroute back to the office. Some staff members indicated that they affixed weapons to their belts while others left the office entirely. This was done as a safety precaution as it was speculated that the RAC had been relieved of his position and would be in a very unstable mental state – capable of "going postal".

II. Cape Cod Task Force (Self-Inspection):

The CCTF is located on the second floor of a small office building. The space meets minimal security needs for the maintenance of case files and none of the retention of Confidential Source files. The dismissal of the Massachusetts State Police (MSP) from the Cape Cod Task Force and the arrival of a new Group Supervisor, have had an immediate impact on case and CS management issues at Cape Cod. The most visible change has occurred in the number of open cases. CS Michael Ferguson has taken immediate steps to close cases where there is no DEA involvement, but substantial MSP interest, transferring any exhibits in DEA custody to that agency. During the management review, it was noted that ten cases had been closed and an additional ten cases were pending closure. This is in

accordance with GS Ferguson's stated objectives outlined in his January 22, 2002 memorandum titled "2001 Self-Inspection" concerning increasing the caliber of investigation and focusing on long term cases to comply with the Division's Filed Management Plan.

A. Enforcement Files

GS Golia and RAC Dudley reviewed eight open cases in order to evaluate the impact of the Self-Inspection on how cases are managed in the office. The most consistent deficiency is that no cases at the CCTF are inputted into the National Drug Pointer Index (NDPIX). The Secretary commented that this had not been done for a couple of years. It should also be noted that the office does not make use of SF 702 forms, Security Container Check Sheets for safes, as required in section 8615.5 of the Planning and Inspection Manual. The following observations were made concerning the content of the reviewed files. Cases found to be in compliance are not mentioned.

CZ-01-0040

* Case is overdue for a status report. Last status completed 9-17-2001.
* Nine non-drug exhibits appear on the DEA 7a.
* Exhibit N-11, $120 OAF was deposited into the MSP safety deposit box.

CZ-01-0043

* Last report written on case October 2001.

CZ-01-0049

* No status reports written on the case since August 2001.

CZ-01-0054

* No status reports written to the case file since 9-1-2001.
* Four (4) drug exhibits listed on one DEA 7.

CZ-02-0007

* At least one investigative report one month late

CZ-02-0008

* No witness on money list for purchase of exhibit 1 (2-26-2202)
* No DEA-6 for Acquisition of exhibit 1.
* DEA 284 in file, but no notation on its use for the acquisition of exhibit 1.

CZ-02-0011

* No G-DEP 202 in file

B. Confidential Source Files

Due to the temporary nature of the facilities of CCTF, all Confidential Source (CS) files are maintained at the Divisional Office. However, the

CCTF has duplicate, informal files for operational needs. At the time of the review, the office maintained five active confidential sources, with the establishment of another pending. The majority of active Confidential Sources have been established since the arrival of GS Ferguson. Seven active and deactivated Confidential Source files were selected for this review. No Confidential Sources were available for interview. As noted in ASAC Cooper's memorandum, a reason for deficiencies may be the retention of the files at the Divisional office. This requires documents being handled by many different people before they make their way from the CCTF to the file in Boston compounding the chance of loss or misfiling. The following summarizes the information gleaned from the review.

CS01-104444 – Deactivated

* No CS statements for exhibit purchases

CS00-101049 – Deactivated

* Case initiation report missing.
* Reactivation for security payment on 3-26-2001, contains no mention of calendar year cap remaining.

CS01-103473 – Deactivated (concurrent use, therefore some deficiencies may apply to other offices)

* Debriefings are not thorough.
* No witness signature on CS statement.
* No case initiation reports.
* No initial debriefing reports.

CS00-101536 – Deactivated

* No case initiation report.
* One DEA 103 is photocopy only, no green copy.

CS02-106989 – Active

* No case initiation report.

CS02-107163 – Active

* No initial debriefing report.

CS 01-103802 – Active

* No case initiation report.

C. Evidence Handling

The CCTF is located in temporary quarters, which has placed physical limitations on secure evidence holding facilities. The office uses standard, locked, roadside mailbox for the temporary storage of drug evidence en route to the Northeast Regional Laboratory or on hold for court, with an accompanying hardbound logbook. The contained is also used for the temporary holding of non-drug evidence. The non-drug evidence room has its own alarm, but has an unbarred window that could theoretically allow access from the outside (theoretical given that the Office is on the second floor). At the time of the visit, the evidence custodian was out of State for training and the alternative was

not familiar with how inventory control files were maintained. The hardbound ledger conforms to the requirements of Agent's Manual 6681.72, but the method used does not allow, or neglects to use, notation as to the document that releases an exhibit after acquisition, e.g. DEA 12, DEA 48a, which is a requirement of the Agent's Manual.

Five exhibits were selected at random from the ledger to determine the accuracy of record keeping. Three were located and appropriate documentation was in the inventory control file. However, under CZ-00-0041, the log shows exhibits N-3, N-4, N-5, N-6 and N-10 were taken for court on 11-1-2001, but no DEA 12 or DEA 48a is in the inventory control files or the case file, reflecting the movement of the exhibits and no notation is in the ledger indicating their return.

Under CZ-00-0031, no inventory control file could be located for exhibits. It should be stressed that the Agent who assisted with this portion of the review was not familiar with the filing system in the non-drug evidence room. The file may be in an inactive/closed inventory file, which could not be located.

The office does not have a separate container for seized and recovered moneys, nor does it have a safe deposit box for the more permanent storage of such items. Prior to the departure of the MSP troopers, seized monies and OAF were lodged in their safety deposit box. Some justification for deficiencies can be made because of the ongoing temporary nature of the facilities at the CCTF, and

given the fact that the MSP were taking charge of seized and recovered monies. However, full compliance with evidence handling should be implemented to maintain the integrity of the process, especially seized and recovered monies.

III. New Bedford Resident office (Interview of Personnel):

On March 20 and 21, 2002, respectively, myself and GS Ducey interviewed the current staff assigned to the NBRO. Additionally, on March 21, 2002, GS John Dudley and GS David Golia met with two TFOs who had recently departed the NBRO. Overall , the following personnel were interviewed:

John Schaefer, RAC
Heather Zemotel, DynCorp (Ms. Zemotel rotates between both offices)
Paul Bock, SA
Christopher Grenier, SA
Todd Shea, SA
Daniel Ford, SA
Robert Jacob, TFO – Detective, Fall River PD
Jeff Silva, TFO – Sergeant (Sgt.), New Bedford PD
Celeste Carbrale, TFO – Deputy, Bristol County Sheriff's Office
William Delaney, TFO – Sgt., MSP
Dennis Ledo, former TFO – New Bedford PD
Dean Fredricks, TFO – New Bedford PD

The following is a synopsis of the interviews conducted at the NBRO. Most, if not all of those interviewed related the same stories. For example,

on the subject of morale, everyone agreed that morale was very poor due to the overriding sense of tension within the NBRO. Much of this tension is carried over from the problems experienced with the MSP and CCTF. Additionally, because of poor decisions made by the RAC regarding personnel and case management, the perception of those interviewed was that the RAC is the cause of this office having such a high turnover of TFOs. Of particular mention was the loss of TFOs Ledo and Sousa referred to as the major case-makers and backbone of the NBRO. Also, due to bar relations with other agencies throughout the region, the NBRO received very little cooperation and few referrals. In fact, according to the interviewees, the Bristol County District Attorney (DA) would not call the RAC for any reason.

Subsequently, all personnel are on edge and divided along the same lines as the CCTF. Each person revealed that the underlying problem revolves around DEA's relationship with the MSP and the RAC's mental state. Again, the relationship with the MSP is tenuous at best and documented both above (CCTF) and below (RAC Schaefer's interview). Pursuant to these "battle of egos" over control, the RAC was often seen visibly upset. When questioned about this struggle for control, most of the staff (including DEA employees) supported the MSP, viewing the RAC position as administrative in nature – the MSP Lts. had formulated and approved all operational plans and directed all enforcement activities on the street. Another oddity associated with the MSP was that they were attached to the District Attorney's C-PAC Team and detailed out to

the CCTF> As such, they were not assigned to the CCTF on a fulltime basis, thus, subject to call-out by the C_PAC and obligated to serve collateral functions at the C-PAC.

Regarding the RAC's mental state, the consensus of those interviewed was that the RAC is mentally unstable. He appears to be preoccupied, forgetful and subject to unpredictable mood swings. He is described as being mentally unstable and possibly a danger to himself and/or others as illustrated by the time he sat alone at his desk, eating lunch with a Kevlar helmet on backwards (this was described as irrational behavior and not meant to be a joke). On another occasion he was heard sitting at his desk dry firing a pistol during a time period when tension in the office was particularly high. Additionally, the RAC was described as condescending, berating and unapproachable.

The RAC was also accused of not allowing the SA/TFOs to do their job. He was blamed for closing out a case which was later absorbed by Boston Group Three's Title III investigation and resulted in the seizure of 240 kilograms of cocaine. The view of those interviewed was the NBRO had information relative to the target of the seizure and his telephone # from a NBRO CS, yet the RAC wanted no part of it. Later, after the Group Three seizure, the RAC supposedly blamed the former case agent for closing out the case, thereby excluding the NBRO from having a role in such significant enforcement activity.

The RAC was also held responsible for the high turnover rate and subsequent lost of investigative opportunities. Because some TFOs were unable ot get along with the RAC, and/or pressured by the RAC, they asked to be removed from the task force. Shortly after their departure two specific TFOs were involved in major investigations which, according to those interviewed, should have had DEA/NBRO involvement. For example, a recently removed Fall River detective conducted an investigation resulting in the seizure of one kilogram of heroin. Prior to the TFO's departure, the NBRO had opened an investigation (CZ-00-0025) on this trafficking group. This case was closed and taken with the departing TFO. Also, on the Saturday prior to these interviews, a similar situation occurred in New Bedford when a recently removed TFO seized approximately $1 million (formerly CZ-00-0024). The NBRO had no role in this event either.

As a result of ongoing problems, the NBRO had been ineffective to the point that very little enforcement action had even been attempted. One of the very few operations, recently conducted, was conveyed over and over again as an illustration of the RAC's ineffectiveness as a leader. The investigation was a reverse sting whereby the undercover agents were selling oxycotin in the Dartmouth area of Massachusetts. Allegedly, the RAC made several tactical and judgmental errors. First, the RAC chose to assign himself as the primary "eye" and recipient of the kel transmissions, yet, the RAC failed to give detailed account of the undercover/suspect movements or updates relative to the conversations. Second, the RAC repositioned

the bust van "out of the play" and reassigned those vehicles which were to have covered a likely money/counter surveillance vehicle to other undisclosed assignments. Third, despite obvious and developing problems during the course of the negotiations (ie-a long verbal struggle between the suspect and the U/C, one suspect observed possibly arming himself) no reasonable command decisions were made by the RAC, to include the ultimate arrest order. When the arrest order was given by another agent, several suspects were allowed to escape due to poor prior planning and lack of coordination. Later, an after action meeting didn't include the three arrest team members making the critique mostly ineffective. When this incident was brought to the attention of the Acting SAC Tom Pasquarello all reports were sent to Boston. According to those interviewed, the RAC rewrote the arrest report "to support his position" and the original DEA-6 has since disappeared.

During the course of the last two years the NBRO staff recalled being interviewed a minimum of three times. Each time they were interviewed by ASAC Carol Cooper. On each occasion they explained their concerns about morale within the office and the RAC. The three interviews occurred at the Self-Inspection, during the Fall of 2000 and in the beginning of 2001.

At the Self-Inspection, many of the same issues were raised, but no action was taken. In the Fall of 2000, two TFOs left the NBRO (details above) causing TFO/MSP Lt. Robert Costa to call ASAC Cooper and voice his concerns. Pursuant to this call,

ASAC Cooper came to the NBRO the next day and interviewed all personnel. The following day, the RAC was called to Boston to meet with ASAC Cooper. Upon returning to the NBRO, the RAC allegedly threatened SA Grenier saying, "What goes around comes around." SA Grenier, in turn, wrote a memo to ASAC Cooper outlining the threat. Accordingly, the RAC was told to have a group meeting wherein he apologized to the group for the threat and the problems within the office. The RAC supposedly stated that all was a result of miscommunications and a difference of opinion. He then asked for a second chance. When the same problems began to occur within two weeks, three agents complained again to ASAC Cooper. They were called up to Boston and told by ASAC Cooper to "make it work" because the RAC's transfer was imminent. Upon hearing this news the RAC allegedly retaliated with threats of poor evaluations and the scrutinization of cell phone tolls. SA Shea indicated that in previous discussions in early 2001 with ASAC Cooper, SA Shea was told that the RAC was being replaced and a date on when the transfer would occur. On a Friday in early 2001, SA Shea stated that RAC Schaefer was called to Boston to meet with Division management. SA Shea believed at this meeting, RAC Schaefer was going to be relieved form command. Following the meeting in Boston, SA Shea stated that he received a call from RAC Schaefer, who indicated to SA Shea that he was returning to the NBRO. SA Shea stated that when he heard of the RAC's return to the office, most of the NBRO personnel went home while others armed themselves thinking the RAC would go "postal".

On the occasion of the third set of interviews (beginning of 2001), many of the local chiefs were interviewed by ASAC Cooper as well as those int eh office, according to those interviewed. Supposedly, most of the chiefs said they could not get along with the RAC.

In December 2001, SA Todd Shea believed he was targeted by the RAC by being sent on temporary duty (TDY) to Rhode Island to assist in a Title III (T-3) investigation. SA Shea stated the TDY was punitive because the drive to Rhode Island from his home was about 80 miles one way. According to SA Shea there was no T-3 and upon complaining to the ASAC the TDY was rescinded by then Acting SAC Pasquarello within three days. SA Shea again thought he was being targeted by the RAC when the Office Assistant at the CCTF tipped SA Shea that the RAC was auditing his leave balance (SA Shea had taken 13 Sick Leave days during said fiscal year). No action was ever taken.

During this time RAC began replacing TFO's with those believed to be loyal to him and referred to as "rats" by the remaining group members. On one occasion an archived DEA-6 was ordered from the warehouse because information within the report contained disparaging remarks about recently arrived TFO Sgt. Al Silva. According to those interviewed, the report stated that TFO Silva, a New Bedford PD Detective, had been receiving kickbacks from a tow company in November of 1999. The interviewees believed such an officer should not be assigned to a DEA task force. TFO Silva stated that this investigation had been unfounded. He went on

to say that he, himself, recently transferred from the Internal Affairs unit within his department. Despite this, on one occasion TFO Silva called SA Gazarra in Boston's Tech Group to make an inquiry regarding TFO credentials. When he gave his name and off location, SA Gazzara asked him if he was the "rate". Later, in December of 2001, TFO Silva found a chopped off rat's tail on the roof of his OGV (TFO Silva maintains photos). It should be noted that these allegations against TRO Silva have not been substantiated.

Another TFO, Bristol County Deputy Sheriff Celeste Cabral was accused of leaking information on an ongoing case. It was later determined that the source of the accusation was a Bristol County Sheriff's Captain and brother of former MBRO TFO/MSP Trooper Bob Andrade. No other action was taken relative to this accusation. In March 2002,TFO Cabral recalled calling Boston's Tech Group for a DEA-284 authorization. At that time, upon hearing her name and office, SA Gazarra asked her if she was "Schaefer's snitch". TFO Cabral also revealed that due to her "neutral" position within the group, she has experienced not being answered on the radio while on operations. TFO Cabral fears that this behavior could repeat itself if she called for cover, thus becoming a safety issue. Aware of the situation, the Bristol County Sheriff has ordered locking cabinets for TFO Cabral and asked her if she would like to leave. She chose to stay for now.

RAC Schaefer had the following responses to the above allegations:

Upon arrival at the CCTF the RAC quickly found that the task force had been run by the MSP. He called it a DEA funded C-PAC: all DEA-7's, 7a's and Standard Seizure Forms (SSF) were written as "information only". Barnstable County C-PAC money was used and re-used with no regard for the evidentiary or recovered funds procedures. Also, body wires were for safety only and not recorded. On one occasion, the RAC observed SA Bock destroying a kel tape recording. When confronted, SA Bock states recording were never made and not necessary in state court. When the RAC insisted a DEA-284 be completed for authorization and a tape be kept in evidence, SA Bock became defense and defiant. Additionally, the Confidential Source policy in place at the CCTF was not that of DEA. According to RAC Schaefer, Management and Inspection condoned and commended the CCTF for its policies and efforts to date. Another issue was that although the MSP would not work full time with the CCTF, they received all of their overtime funding through OCDETF and U.S. Customs. Additionally, the MSP received the majority if not all asset sharing monies. Eventually, the Barnstable PD Chief wrote a memo dated (9/22/00) requesting his department receive its rightful share.

As for the alleged threat the RC made to MSP Lt. Allen: The two men were arguing in the RAC's office. The Lt. accused the RAC of being a coward because the RAC "never went on the street". According to the RAC, he responded by asking the Lt. if it would make him feel better if they went outside to fight (the Lt. is supposedly a very large man in contrast to the RAC's size). The Lt. retorted,

"Is that a threat?." The RAC said, "Fuck you." In the end, there was no fight and the RAC claims he later told ASAC cooper of the incident and apologized to the Lt. Upon arrival at the newly opened NBRO, the RAC told representatives of the MSP that they were not in charge nor would they be allowed to operate under a "hybrid" system as they had at the CCTF. As often happened, this prompted a telephone call from TRO/MSP Lt. Bob Costa to ASAC Cooper. Lt. Costa told the ASAC the RAC threatened the MSP by stating MSP were in the RAC's "crosshairs". (The RAC maintained that his constant pipeline of his agents and TFO's to the ASAC diminished his authority at the NBRO). Pursuant to Lt. Costa's call, ASAC Cooper responded to the NBRO and interviewed all personnel.

On 4/27/01, the RAC's wife received a call at her place of employment. The female caller told the RAC's wife that she and the RAC were having an affair. This call came one day after the RAC had an argument with Lt. Melia. The RAC was informed of the call by his wife who already knew of a past affair the RAC had when the two were separated. Subsequently, she was not upset. It should be noted, however, that the one person the RAC had told about the past affair was SA Shea. Further, the name used by the alleged "mistress: was that of SA Shea's neighbor and the voice of the "mistress" was that of SA Shea's then girlfriend (The RAC knew the girlfriend and recognized her voice.) The RAC maintains a copy of the taped conversation between his wife and the "mistress".

As a result of the above suspicions, then SAC Mazzilli told the RAC to transfer SA Shea. In reality. In realty, SA Shea was sent to Rhode Island TDY , instead. This TDY, however, was rescinded by A/SAC Pasquarello within three days. According to RAC Schaefer, each time he begins to turn things around in a positive way DEA Boston becomes involved, undermining the RAC's position and/or authority.

IV. New Bedford Resident office (Self-Inspection):

The New Bedford Resident Office)NBRO) has been located on the third floor of a once commercial shopping mall since June 2001. They are due to move into new space in June/July 2002. The office does not have a secretary and according to RAC Schaeffer, he is the one who does the filing. The space consists of two large rooms, with no private office space for the RAC or secure space for cause files and evidence room. The entire facility has one alarm. Case files are located in bar locked file cabinets. The office does not have access to FIREBIRD, NCIC or NLETS. No closed investigative files are maintained at the NBRO, all are sent to the Divisional office for safekeeping. According to RAC Shaefer, the DEA 381 log is maintained by the CCTF. Like the CCTF, NDPIX entries are not made on G-DEP, DEA 202s, nor are entries made into the NDPIX database for NBRO cases. Nine open cases were reviewed.

A. Enforcement Files

CZ-02-0001

*Duplication of use of exhibit N-1

CZ-02-0009

*No case initiation report on file

CZ-01-0006

*No money listed for the purchase of exhibit 1.
*No CI statement for purchase of exhibit 1.

CZ-01-0012

*Money list has incorrect format.

One of the statements identified on ASAC Cooper's Self-Inspection was that properly redacted Confidential Source statements were located in the relevant case bulk file and not the case file itself. RAC Shaeffer addressed this in his response to the Self-Inspection, but one case file reviewed was still found to have the redacted statements in the bulk file.

B. Confidential Source Files

All Confidential Source files are maintained at the Divisional Office. A total of six active or deactivated files were reviewed.

CS00-100609 – Active

*No CI statement for acquisition of exhibit 11.
*No CI statement for the acquisition of exhibit 15.

*No DEA 12 in file for payment over $3,000 (showing GS 15 approval)

CS01-105185 – Deactivated

*No case initiation report in file.
*No signed statement by Confidential Source.

CS01-102598 – Deactivated

*No case initiation report for CZ-00-0025

One confidential source, CS01-103836, was interviewed on 3-20-2002, without the presence of controlling agents. The CS has been active for about six months and his/her reason for cooperation is assistance in obtaining resident alien status. He/she was aided in entering the USA by Agents for the purpose of developing an investigation. According to the responses of the CS to questions non his/her handing.

C. Evidence Handling

The non-drug evidence vault is a room whose temporary nature is obvious from the chicken wire that forms the barrier from the end of the sheet-rock walls that are about twelve feet high, to the ceiling. The room has no alarm of its own. Inventory files were (closed and active) found to be well maintained. The non-drug inventory ledger complies with the requirements of Agency's Manual section 6681,72. Fur non-drug exhibits were selected at random from both the inventory control files and the non-drug log book. All supporting documents, i.e., DEA 12, DEA

7A or DEA 48A were on hand for the exhibits selected and the exhibits were readily located. Like the CCTF, the evidence room has anon-barred window with theoretical access possible from the outside (theoretical since the window is on the third floor).

There is no drug storage facility at the NBRO. Like the CCTF, the NBRO has a lockable, roadside mailbox for the short-term storage of drug evidence that they have had for about two months. But since it has not been bolted to the floor, it has never been used and there are not entries in the overnight (or otherwise) log. When questioned where drugs are stored immediately after seizure or for court, reviewing agents were told that the RAC had a two drawer combination Mosler safe, but there is no log for that safe. With regard o seized and recovered monies, when reviewing agents asked for the related logbook, they were show a log with a single incoming entry in October 2001, no outgoing entry. A short time later, SA Grenier, seized and recover monies custodian, provided agents with a second log showing both incoming and outgoing entries for the exhibit in the original log. There was no adequate explanation for the two logs. As with the drug evidence, seized and recovered monies are stored in the Mosler safe. At the time of the visit, there were no monies in the safe, however there was a gun (exhibit). The office does not have a bank safety deposit box for long term safe storage of seized and recovered monies. In addition to housing seized weapons, seized and recovered monies and the temporary storage of drug evidence, the Mosler safe also serves the security needs of the RAC. This

violates the need to keep monies and guns separate from other non-drug evidence and drug evidence separate fro non-drug. Government funds are also stored in the safe.

SA Grenier serves as both the sub-principal cashier and the seized and recovered monies custodian which violates the proper segregation of financial duties. (See DVO Bulletin 01-02, dated 6-5-2001, Segregation of Duties Policies.)

Conclusions:

*During the course of these interviews, the majority of the interviewees related that these interviews constituted the second and/or third occasion they were spoken to by a representative of DEA Boston management – ASAC Carol Cooper. Subsequently, each person had reservations about speaking with ASAC Benson and GS Ducey, in addition to questioning DEA's lack of desire and professionalism in dealing with this issue.

*It's apparent that RAC Schaefer walked into a setting laced with a long established history, unique politics, institutionalized (non-DEA) practices and strong personalities. Any change brought about by the RAC, or attempt to regain control of the CCTF and NBRO was met with fierce opposition.

*It became readily apparent that these offices were faced with a negative political environment both on Cape Cod and in the New Bedford area; dissention among the staff (both DEA and Task Force Officers) weakened the role of the RAC; and, a division of

listed personnel on opposite sides of all issues based upon cliques and personalities destroyed all comradery and teamwork.

*The morale, specifically within the NBRO, reflects not only insubordination and a lack of regard for one another, but raises serious concerns about agency/officer safety.

*At the epicenter of each and every negative issue, according to these interviews, is the RAC. All of the related problems seem to radiate from a sense of division within the office. The underlying reason for this division is clearly two schools of thought separating the offices into two camps: those who hae taken the side of the RAC and those who continue to disagree with him. Those who oppose the RAC may have taken these disagreements to extreme, even hurtful measures. Most troubling of all is that this camp is made of a representative sampling of both offices, to include DEA employees. These DEA employees include CCTF office Assistant Diane Thompson and NEBRO Special Agents Shea and Bock. Based on the removal of the CCTF Officers and Lts., it appeared to ASAC Benson and GS Ducey that these employees developed a "personal" hatred toward RAC Schaefer and made efforts to try to remove RAC Schaefer from his position.

*Good, bad or indifferent, the ultimate driving force behind the woes of these offices appears to be personality and philosophical differences.

Recommendations:

*Systematic, across the board transfers/removal of all assigned personnel (NBRO) appears to be the only viable solution to what appears to be a long term, ongoing, institutionalized issue fueled by preconceived notions and prejudices towards the RAC. These problems appear to have been rooted some time ago and allowed to fester up to their present state.

*Close supervision and the utmost support provided to the CCTF, combined with continued negotiations between DEA and the Massachusetts State Police)MSP), as well as all other regional counterparts, in an attempt to find middle ground on the issue of reestablishing the CCTF as an effective drug enforcement unit, under the leadership of DEA.

*Reestablishment of the CCTF, to include non-supervisory MSP representatives.

*Both offices will require close supervision during what's sure to be a slow and tentative reconstruction period.

Atch

cc: John B. Brown III (HQ/AD)
Roger E. Guevara (HQ/OC)
James L. Capra (HQ/OCX)

Memorandum

Subject
Recommendation for Transfers: Special Agents
Chris Grenier, Todd Shea, and Paul Bock
New Bedford Resident Office
Boston Division

Date
SEP 26 2002

To
Rogelio E. Guevara
Chief of Operations

From /s/
George J. Cazenavette III
Chief Inspector

During the period August 19-30, 2002, the Office of Inspections (IN) conducted an on-site inspection of the Boston Division. As part of that inspection, the New Bedford Resident Office (RO) was inspected August 19-20, 2002

IN recommended that 11 finding be issued to the New Bedford RO in the following program areas- Enforcement Effectiveness, Division Inspection Program, Performance Evaluations, Evidence Handling CS Management, Imprest Fund Management, Seized Assets, Accountable Property, Fiscal Operations, Physical Security/Security Sweep, and Space and Utilities.

The New Bedford RO is staffed by an acting Resident Agent in Charge (RAC), three Special Agents (SA) and Task Force officers. Two of the SAs are GS-13s and one a GS-12. Inspectors determined that SAs Chris Grenier, Todd Shea, and Paul Bock failed to properly execute their assigned and collateral duties. IN reviewed the collateral duty list for the office and found SA Grenier was responsible for seize and recovered monies, imprest fund, and office safety. SA Shea was responsible for drug evidence, accountable property, and office security. SABock was responsible for nondrug evidence IN determined the lack of oversight by SAs Grenier, Shea, and Bock in the above mentioned critical program areas was a significant contributing factor in the issuance of these Findings. All three SAs assigned to the New Bedford RO contributed to, or were the basis for, the deplorable office conditions, the general lack cleanliness, and lack of security at the New Bedford RO. The actions, or lack thereof, by SAs Grenier, Shea, and Bock were significant contributing factors to the issuance of the Evidence Handling Enforcement Effectiveness, CS Management, Space and Utilities, Security, and Security Sweep Finding-These Findings were directly attributable to SAs Grenier, Shea, and Bock. IN noted a general lack of respect for DEA, DEA property, and indifference toward the DEA mission displayed by SAs Grenier, Shea, and Bock.

Through a random review of investigative files, IN found the New Bedford RO was not conducting enforcement operations in an effective and efficient manner. IN determined that approximately 50 percent of the-cases were in the

Summary Report format and claimed arrests and seizures. These cases did not contain any documentation of DEA presence, participation, and/or follow-up investigation, these cases were opened upon information being supplied from the police departments that make up the task force in the office. The office had not conducted any Title III investigations during the last three fiscal years and had not initiated an OCDETF investigation in the past year and a half. The office had only four active CSs or approximately .36 CSs per law enforcement officer (LEO). This figure is approximately half the national average of .68 CSs per LEO. The enforcement effectiveness review also revealed that SAs Shea and Bock had not established a CS in the past year.

While conducting the review of the drug evidence program, SA Shea told the Inspectors that the New Bedford RO only seized drugs during normal office hours, as an explanation for not having the required logbooks. IN's investigative file review found several instances where drug evidence had been stored in the office overnight.

A review of other inspection related documents revealed that a Management Review of the situation in the New Bedford RO was conducted earlier in the year at the direction of SAC Trouville. Part of that review centered on the relationship between the New Bedford RO and the Massachusetts State Police. In an interview with SAC Trouville, he stated that SAs Grenier, Shea, and Bock failed to support DEA and its mission, and in fact actively supported the position of the

Massachusetts State Police against DEA's interests. Additionally, an interview with a Task Force Officer raised concerns that SAs Grenier, Shea, and Bock were not following established policies and procedures, thus exposing DEA to unnecessary liability. The TFO stated that the total disregard of DEA's CS policy by Grenier, Shea, and Bock would lead to a "Whitey Bulger incident" (a reference to a widely publicized scandal involving the improper handling of organized crime informants by FBI agents).

Based upon the results of the on-site inspection, and in concurrence with the management review conducted by the Boston Division, I recommend that SAs Grenier, Shea, and Bock be relocated to other divisions.

cc: Asa Hutchinson
Administrator

John B. Brown,
HJ Deputy Administrator

Memorandum

Subject
Management Review of the
New Bedford Resident Office and
Cape Cod Task Force (FFS 140-01)

Date August 13, 2002

To

Charles H. West
Deputy Chief Inspector
Office of Inspections

From /s/
Mark R. Trouville
Special Agent in Charge
New England Field Division

In the latter part of March 2002, I ordered an internal management review of the New Bedford Resident Office (NBRO) and the DEA Cape Cod Task Force (CCTF). The purpose of the management review was to assess the overall operation, management and effectiveness of both offices. This was as a result of issues raised during the NBFD 2001 Self Inspection and conversations with former New England Field Division (NEFD) SAC Mazzilli and current ASAC Carol Cooper. I assigned NEFD ASAC Rodney Benson overall responsibility for the review and ASAC Benson was assisted by one NEFD RAC and two G/S's. The results of this review are attached for your information.

Based on the review conducted, I believe that there has been a history of mismanagement and lack of appropriate oversight in both offices. The combination of ineffective or "Acting" DEA supervisors and the presence of very senior Massachusetts State Police (MSP) officers lead to the abdication of DEA's leadership role in the offices. RAC Schaefer, upon his arrival, did not possess the needed diplomatic nor management skills to properly reassert DEA's leadership role. His heavy handed attempts appear to have been met with rebellion not only from the MSP officers, but also from several of our Special Agents. Upon my arrival and initial assessment of the situation, I directed that the Cape Cod office no longer report to RAC Schaefer, but report directly to ASAC Cooper. My plans to change leadership of the New Bedford office were resolved when RAC Schaefer retired in August 2002.

With the arrival of GS Ferguson, I believe the Cape Cod Office is now on the proper course. I have recently selected an Agent from the Providence RO to assume the duties of Acting RAC in New Bedford until a selection for a permanent RAC can be made. Liaison with the New Bedford Police Chief has resulted in a continued loyalty to the NBRO. Discussions with the MSP will continue as we move forward in our efforts to refocus the NBRO.

Any questions may be directed to me at 617-557-2118.

Atch

cc: John B. Brown III (HQ/AD)
Roger E. Guevara (HQ/OC)
James L. Capra (HQ/OCX)

as problems with the Mass. State Police. We did discuss that these agents were working low level cases with the Mass. State Police instead of doing their job as DEA agents and trying to work a case up which is much harder and takes a lot more effort.

Q Cazenavette had said the agents had taken a side with the Mass. State Police?

A Yes.

Q And that's precisely what Mr. Benson's management review report indicates?

A Yes, it's basically the same, it's similar. Again, not with the depth, but yes.

Q And Cazenavette said these agents had taken the side of the Mass. State Police with respect to the complaints against John Schaefer?

A I don't understand the question.

Q When Cazenavette said these agents had taken the side of the Mass. State Police, it was in reference to the complaints against John Schaefer?

A I don't know that to be true, Counselor.
My understanding and impression of what he was discussing was he was taking their side in the problems that were at the office. I don't know that he ever mentioned a complaint.

Q Do you recall your deposition?

A Yes.

Q You were under oath then, true?

A Yes, I apologize, yes.

Q And I asked you on page 107, did Cazenavette discuss Schaefer at that time? You answered no. Did he discuss the Mass. State Police? You answered a little bit, that was part of the problem. He felt that these three agents had, and I hate to say, taken a side but there is really no other way to say it, taken a side with the Mass. State Police in the beef with management there, with Schaefer, and that they were not performing DEA cases at DEA levels.

A Yes, but you asked me about complaints and nowhere do I recall a conversation about complaints, that's what I said to you.

Q When Cazenavette said these agents had taken a side with the Mass. State Police, it was in reference to the beef with John Schaefer?

A Reference, and that's my phrase, beef.

Q Meaning?

A The disagreement between the agents and Schaefer, yes.

Q Page 15 of Agency Exhibit 1. This is Benson's management review report, the last page?

A Yes.

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Q And Benson mentions that at the epicenter of each and every negative issue, according to these interviews, is the RAC?

A Yes.

Q And that was John. Schaefer?

A Yes.

Q And you discussed that with him, with Mr. Benson back in March?

A Yes

Q And he states that there were two schools of thought separate one office into two camps?

A Just a second. Where are you, sir?

Q The same paragraph, I jumped ahead trying to speed it up but take your time.

A All right. Go ahead, sir.

Q And what Benson meant by two schools of thought were those -who were against the RAC and those who were for him?

A He clearly states in the rest of the sentence, those who have taken the side of the RAC and those who continue to disagree with him.

Q And that's consistent with what you said, taking the side in the beef with the RAC?

A Yes, that's true.

(Pause)